89-231

Supreme Court, U.S.
FILED
AUG 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and
RAYMOND R. CLEMENTS,

*Petitioners,*

v.

FRANK L. BIRD, Trustee of the FRANK L. BIRD
PROFIT SHARING TRUST, FRANK L. BIRD, Individually,
and JOAN SHEA,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

THEODORE A. KREBSBACH
*Counsel of Record for Petitioners*

Office of the General Counsel
Shearson Lehman Hutton Inc.
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
*Of Counsel*

## QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), mandates arbitration of claims asserted under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982), when parties have agreed to resolve their disputes by arbitration?

## RULE 28.1 LIST

### Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Hutton Inc.

*Active Subsidiaries*

Boston Hambro Corp.
Boulevard Investors Inc.
Boulevard Real Estate Corp.
Burlington Investors Inc.
E.B. Realty Corp.
Lombard Realty Corporation
Lowell Investors Inc.
Lowell Real Estate Corp.
Shearson Dat-Cheong Company Limited
Shearson/KM, Inc.
Shearson/NGP Inc.

*Affiliates*

California S.A.
Shearson Financial Services of Oklahoma, Inc.
Shearson Financial Services of Texas, Inc.
Shearson Lehman Hutton SARL
Intermodal Equipment Associates
KCC Syndicate Managers, Inc.
New World Corporation
Rex Moor Properties Incorporated
Sovran Energy Corp.

## Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Hutton Holdings Inc., the parent company of Shearson Lehman Hutton Inc.*

*Active Subsidiaries*

FGIC Corporation
LBKL 82-1 Investors
SB Holding Corporation
Shearson Lehman Hutton Finance S.A.
Panagora Asset Management Limited
Vernitron Corporation
Dr. Pepper Holding Company
The Barony Company
First Capital Holdings Corp.
Anagel-American Shipholding Limited

*Affiliates*

American Marketing Industries Holdings Inc.
Laurel Capital Growth Investors Corporation
Save Mart Supermarkets
O.M.B. Limited Partner Ltd.
SLH Capital Partners I Inc.
Shearson Beverage Corporation

*Inactive Subsidiaries*

Mideast-American Inc.

---

* The parent company of Shearson Lehman Hutton Holdings Inc. is the American Express Company.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Rule 28.1 List | ii |
| Table of Authorities | vii |
| Statutory Provisions Involved | xiii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 5 |
| I. The Court Should Grant Certiorari to Resolve The Fully Developed Conflict Among the Circuit Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate ERISA Disputes. | 8 |
| A. The Second and Third Circuits Have Refused to Enforce Private Agreements to Arbitrate ERISA Disputes Based upon Their Erroneous Belief that Congress Intended to Prohibit Enforcement of Such Agreements And Their Misapplication of The Court's Labor Arbitration Jurisprudence. | 10 |
| B. The Eighth Circuit Has Enforced Agreements to Arbitrate ERISA Disputes in Accordance with Recent Decisions of the Court That Uphold Private Agreements to Arbitrate Commercial Statutory Disputes Pursuant to the Federal Arbitration Act. | 14 |

Page

II. Should the Court Grant Certiorari to Resolve The Conflict Regarding the Arbitrability of ERISA Disputes, It Will Also Have the Opportunity to Clarify the Distinctions Between its Commercial and Labor Arbitration Precedents and Avoid the Need to Address the Arbitrability of Other Federal Statutes on a Case-By-Case Basis. ..... 16

III. The Issues Presented to the Court Require Early Resolution to Avoid Increased Congestion and Provide Uniformity Throughout the Lower Courts as well as to Avoid Duplicative Proceedings Between Parties to a Dispute. ..... 18

Conclusion ..... 21

Page

Appendices


A. Statutory Provisions Involved ..... A-1

B. Opinion of the United States Court of Appeals for the Second Circuit, Dated March 28, 1989 ..... A-5

C. Order of the United States Court of Appeals for the Second Circuit Denying Petitioners' Motion For Rehearing and Suggestion For Rehearing *In Banc*, Dated May 9, 1989 .... A-19

D. Opinion of the United States District Court for the District of Connecticut, Dated April 4, 1988 ..... A-20

E. Judgment of the United States Court of Appeals for the Second Circuit, Entered on March 28, 1989 ..... A-26

## TABLE OF AUTHORITIES


Page

Cases

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) ..... *passim*

*Alford v. Dean Witter Reynolds, Inc.*, 712 F. Supp. 547 (S.D. Tex. 1989) ..... 17

*American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) ..... 4

*Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) ..... *passim*

*Berrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) ..... *passim*

*Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292 (2d Cir. 1989) ..... *passim*

*Bruno v. Prudential-Bache Securities Inc.*, No. E005087 (Cal. Ct. App. Nov. 28, 1988) ..... 17

*Burte v. Shearson Lehman/American Express, Inc.*, No. 86 Civ. 2392 (VLB) (S.D.N.Y. May 3, 1989), *appeal pending*, No. 89-7554 (2d Cir. 1989) ..... 16

*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) ..... 6, 19

*DeSapio v. Josephthal & Co.*, 540 N.Y.S.2d 932 (1988) ..... 17

*Garfield v. Thomson McKinnon Securities, Inc.*, No. 88 C 3027 (N.D. Ill. Dec. 16, 1988) ..... 17

Page

*Gilmer v. Interstate Securities Corp.*, No. C-C-88-0396-M (W.D.N.C. Jan. 17, 1989), *appeal pending*, No. 88 1796 (4th Cir. 1989) ..... 16

*Gorinsky v. Bear, Stearns & Co.*, No. 89 Civ. 1224 (MBM) (S.D.N.Y. May 2, 1989) (Lexis, Fedsec library, Courts file) ..... 15

*Iacono v. Drexel Burnham Lambert, Inc.*, No. 88-0686 L (D.R.I. June 8, 1989) (Lexis, Fedsec library, Courts file) ..... 15

*Jones v. Baskin, Flaherty, Elliot & Mannino*, 670 F. Supp. 597 (W.D. Pa. 1987) ..... 16

*McDonald v. City of West Branch*, 466 U.S. 284 (1984) ..... *passim*

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) ..... *passim*

*Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) ..... 16, 17

*Pihl v. Thomson McKinnon Securities Inc.*, No. 87-7632 (E.D. Pa. May 25, 1988) (Lexis, Fedsec library, Courts File) ..... 17

*Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) ..... *passim*

*Rosenblum v. Drexel Burnham Lambert, Inc.*, 700 F. Supp. 874 (E.D. La. 1987) ..... 9, 15

*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... *passim*

Page

*Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987) ..... 16

*Steele v. L.F. Rothschild & Co.*, 701 F. Supp. 407 (S.D.N.Y.), *appeal dismissed*, 864 F.2d 1 (2d Cir. 1988) ..... 17

*Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) ..... *passim*

*Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988) *reh'g denied*, 872 F.2d 264 (1989) ..... 17

*Tcherepin v. Knight*, 389 U.S. 332 (1967) ..... 11

*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) ..... 12

*Utley v. Goldman, Sachs & Co.*, 49 Empl. Prac. Dec. (CCH) ¶ 38,701 (D. Mass. Jan. 17, 1989), *appeal pending*, No. 89-1218 (1st Cir. 1989) ..... 17

*Wilko v. Swan*, 346 U.S. 427 (1953) ..... 10

**Statutes and Regulations**

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1982) ..... 16

Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982) . 11

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.* (1982) ..... 4, 10

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ..... 2

| | Page |
|---|---|
| 29 U.S.C. § 1001(b) | 4 |
| 29 U.S.C. § 1104 | 3, 10 |
| 29 U.S.C. § 1132(a) | 10 |
| 29 U.S.C. § 1132(e) | 4 |
| 29 U.S.C. § 1132(e)(1) | 10 |
| 29 U.S.C. § 1144(d) | 9 |
| Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982) | 4 |
| 9 U.S.C. § 3 | 4 |
| Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1982) | 11 |
| Minnesota Human Rights Act, Minn. Stat § 363.06 | 17 |
| New York Human Rights Law, § 296 | 17 |
| Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) | 5 |
| Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982) | |
| Sec. 12(2), 15 U.S.C. § 77*l*(2) | 8 |
| Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) | 2 |
| Sec. 10(b), 15 U.S.C. § 78j(b) | 3, 8, 11 |
| Sec. 19, 15 U.S.C. § 78s | 3 |

Page

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240-10b-5 ..... 4

28 U.S.C. § 1254(1) (1982) ..... 2

**Articles**

Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Tex. L. Rev. No. 3 (forthcoming Feb. 1990) ..... 9, 12

**Other Materials**

Annual Report of the Director of the Administrative Office of the United States Courts (1987) ..... 19

Annual Report of the Director of the Administrative Office of the United States Courts (1988) ..... 18, 19

Brief for Respondents, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... 11

Petition for Writ of Certiorari, *Management Recruiters Int'l, Inc. v. Swenson*, No. 89-42 (July 10, 1989) ..... 17

Speech by Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association on August 31, 1985, reported by UPI, August 31, 1985 ..... 18

Speech by Chief Justice Warren E. Burger at New York University on March 18, 1982, reported in the Christian Science Monitor, November 24, 1982 ..... 18

## STATUTORY PROVISIONS INVOLVED*

*United States Arbitration Act*

Section 2, 9 U.S.C. § 2

Section 3, 9 U.S.C. § 3

*Employee Retirement Income Security Act*

29 U.S.C. § 1001(b)

29 U.S.C. § 1104

29 U.S.C. § 1132

29 U.S.C. § 1144

* The text of these provisions is reproduced in full at Appendix A hereto.

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and
RAYMOND R. CLEMENTS,

*Petitioners,*

v.

FRANK L. BIRD, Trustee of the FRANK L. BIRD
PROFIT SHARING TRUST, FRANK L. BIRD, Individually,
and JOAN SHEA,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

Petitioners Shearson Lehman/American Express Inc. ("Shearson") and Raymond R. Clements, defendants below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on March 28, 1989, which affirmed an order of the United States District Court for the District of Connecticut dated April 4, 1988. The Second Circuit denied petitioners' motion for rehearing and suggestion for rehearing *in banc* by order dated May 9, 1989.

The district court partially enforced the agreement of the parties to arbitrate their disputes arising from their customer-broker relationship. The district court ordered the parties to arbitrate

respondents' claim asserted under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) (the "Exchange Act"), but refused to enforce the parties' arbitration agreement with respect to respondents' claim asserted under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA").

The Second Circuit affirmed the district court's order enforcing the parties' agreement to arbitrate their § 10(b) dispute based on the Court's opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). The Second Circuit, in a divided opinion, also affirmed the district court's order which declined to enforce the parties' agreement to arbitrate their ERISA dispute, and held that Congress intended to prohibit the enforcement of such an agreement. *See Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292 (2d Cir. 1989).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 871 F.2d 292, and is reproduced at Appendix B hereto. The order of the court of appeals denying petitioners' motion for rehearing and suggestion for rehearing *in banc* is unreported but is reproduced at Appendix C hereto. The opinion of the United States District Court for the District of Connecticut is unreported but is reproduced at Appendix D hereto.

## JURISDICTION

The judgment of the court of appeals was entered on March 28, 1989 and is reproduced at Appendix E hereto. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

## STATEMENT OF THE CASE

Respondent Frank L. Bird, the trustee as well as a participant and a beneficiary of the Frank L. Bird Profit Sharing Trust (the "Trust"), opened a securities account on behalf of the Trust in or around July 1984 with Mr. Clements, a former Shearson registered representative, in a Shearson branch office located in Boston, Massachusetts. At or around the time Mr. Bird opened the securities account for the Trust, he executed a Customer's Agreement with Shearson in his capacity as trustee. The Customer's Agreement defines the terms and conditions of the parties' business relationship and includes their agreement to arbitrate any controversy relating to the Trust's securities account at one of three designated self-regulatory organization ("SRO") arbitration forums[1]:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to [the Trust's] accounts, to transactions with [Shearson] for [the Trust] or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as [the Trust] may elect.

Respondents filed a complaint against Shearson and Mr. Clements in the United States District Court for the District of Connecticut on or around July 21, 1987. The complaint alleges that from July 1984 through May 1986, petitioners traded the Trust account excessively and inappropriately in light of the Trust's investment objectives. The complaint alleges that this conduct constitutes: (a) a breach of fiduciary duties under ERISA, 29 U.S.C. § 1104; (b) a violation of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Securities and Exchange

---

[1] The SROs are all overseen by the Securities and Exchange Commission. *See* § 19 of the Exchange Act, 15 U.S.C. § 78s. The Court in *McMahon* examined the SRO arbitration forums and found them to be fair, efficient and fully capable of resolving statutory disputes.

Commission Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5; (c) a violation of various provisions of the Connecticut General Statutes; and (d) a violation of various provisions of the Massachusetts Laws.

Respondents filed a motion for leave to file an amended complaint which the district court granted on September 29, 1987. The district court subsequently dismissed certain state law claims of respondents, and respondents voluntarily withdrew their remaining state law claims.

Shearson and Mr. Clements filed a motion in the district court on or around August 17, 1987 for an order enforcing the arbitration agreements entered into by the parties pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). The district court issued a bench ruling on April 4, 1988 which held, in the first instance, that the parties' arbitration agreement is valid, and further held that respondents' § 10(b) claim must be resolved by arbitration in accordance with the Court's opinion in *McMahon*. The court, however, refused to enforce the parties' arbitration agreement with respect to respondents' ERISA claim, citing as supporting authority cases that were decided prior to the Court's opinions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *McMahon*, and *Rodriquez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). The district court also relied on ERISA's policy of providing ERISA plaintiffs with "ready access" to the federal courts through ERISA's exclusive jurisdiction provision and its liberal rules governing service of process, venue, attorneys' fees and statutes of limitations. *See* 29 U.S.C. §§ 1001(b), 1132(e). Finally, the district court cited as authority the Second Circuit's opinion in *American Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (antitrust claims nonarbitrable) and the Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration held under a collective bargaining agreement does not preclude subsequent federal action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1982)). *See* Appendix D at A-23-24.

Petitioners filed an appeal with the court of appeals to review the district court's denial of their motion to compel arbitration of the ERISA claim. A divided court of appeals affirmed this portion of the district court's opinion on March 28, 1989 and ruled that Congress intended to prohibit enforcement of an agreement to arbitrate an ERISA claim. *See Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d at 295-98. The court of appeals, in its *de novo* review of the district court's order, also found that a valid arbitration agreement exists between the parties and affirmed the district court's order compelling arbitration of the parties' § 10(b) dispute. *Id.* at 294-95. Petitioners filed a petition with the court of appeals for rehearing and suggestion for rehearing *in banc*. The court denied rehearing in an opinion dated May 9, 1989 from which Judge Cardamone dissented. *See* Appendix C.

## REASONS FOR GRANTING THE WRIT

The Court should grant the writ in this case to resolve the significant and fully developed conflict among the Circuit Courts of Appeals over the enforceability of agreements to arbitrate ERISA claims, as well as to assist the lower courts in determining whether to enforce agreements to arbitrate claims asserted under other statutes which have not been addressed by the Court.

The refusal of the Second Circuit to enforce the agreement of the parties to arbitrate their ERISA dispute follows the holding of the Third Circuit in *Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) and directly conflicts with both the Eighth Circuit's ruling in *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) and the Court's modern commercial arbitration jurisprudence. The Court has attempted in numerous cases to eliminate the judiciary's long-standing hostility towards arbitration in furtherance of congressional intent underlying the Federal Arbitration Act, and, has in recent years, enforced agreements of parties to arbitrate claims asserted under the federal antitrust laws, the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.

§ 1961 *et seq.* (1982) ("RICO"). The Court has categorically rejected the assumption that arbitrators are not capable of enforcing rights afforded and obligations imposed by statutes; rather, it assumes that an arbitration forum is capable of resolving statutory claims and has placed a burden on a party opposing arbitration to rebut this assumption by affirmatively showing that Congress intended to prohibit the enforcement of an agreement to arbitrate the particular statutory claim at issue. *See McMahon*, 482 U.S. at 226-27 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Mitsubishi*, 473 U.S. at 628, 632-37).

The Second Circuit's refusal to enforce the parties' agreement to arbitrate their ERISA dispute was based on various provisions of ERISA which the Court has rejected as evidencing congressional intent to prohibit arbitration of any statute. The Second Circuit expressly chose to ignore the Court's pronouncements in *Mitsubishi*, *McMahon* and *Rodriguez*. Instead it followed the Third Circuit's outdated opinion in *Barrowclough* which mistakenly relies on the Court's labor arbitration jurisprudence in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), notwithstanding the fact that these cases are unrelated to commercial arbitration or to the Federal Arbitration Act. The Second Circuit's opinion is premised solely on an outdated judicial hostility to arbitration and not on any cognizable evidence of congressional intent to prohibit arbitration of ERISA disputes. As the dissenting opinion acknowledged:

> In the final analysis, what remains of my colleagues' underlying premise must be that Congress could not have envisioned arbitration of ERISA's remedial statutory rights because arbitrators are not up to the task. Yet, that assumption appears untenable. . . . *See McMahon*, 107 S. Ct. at 2340; *Mitsubishi*, 473 U.S. at 633 . . .; [*Byrd*]; *Moses H. Cone Memorial Hosp.* [*v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)]. . . .

*Bird*, 871 F.2d at 300 (Cardamone, J., dissenting).

The Eighth Circuit in *Sulit*, contrary to the Second and Third Circuits, follows the Court's modern commercial arbitration precedents and has enforced agreements to arbitrate ERISA disputes:

> We recognize *McMahon* is not an ERISA-based case. Even so, following the Court's analytical approach to agreements providing for arbitration of statutory claims, we believe the parties' agreements to arbitrate ERISA claims are "enforce[able]. . . in accord with the explicit provisions of the Arbitration Act."

*Sulit*, 847 F.2d at 477 (citing *McMahon*).

The conflict among the circuits is fully developed. Courts either apply the Court's rationale in *Mitsubishi*, *McMahon* and *Rodriguez* to the ERISA statute and enforce valid agreements to arbitrate ERISA disputes – consistent with every statute the Court has ever analyzed under the Federal Arbitration Act – or they refuse to enforce agreements of parties to arbitrate ERISA disputes based on an unsubstantiated mistrust of arbitration rejected by the Court. Only this Court can resolve the conflict and prevent unnecessary and time-consuming litigation over this issue, and petitioners respectfully suggest that it do so in this case. Should certiorari not be granted, the lower courts will continue to be burdened with motions to compel arbitration and lawsuits involving ERISA that should be resolved by arbitration, which will increase congestion in the already overcrowded federal court system and continue to result in the inconsistent treatment of this issue.

Furthermore, the significance of the Second and Third Circuits' misapplication of the Court's labor arbitration precedents extends beyond ERISA. The rationale of these courts is identical to that of courts which refuse to enforce valid agreements of parties to arbitrate other statutory claims. These courts refuse to adhere to the Court's directives in *Mitsubishi*, *McMahon* and *Rodriguez* and instead rely on its opinions in *Alexander*,

*Barrentine* and *McDonald*, notwithstanding the fact that these two lines of cases are clearly distinguishable. The Court applies the former line of cases to commercial arbitration under the Federal Arbitration Act and the latter to labor arbitration under a collective bargaining agreement. Should the Court grant certiorari to resolve the conflict among the circuits as to the enforceability of agreements to arbitrate ERISA disputes, it will also have the opportunity – if it so chooses – to clarify the distinctions between its commercial and labor arbitration precedents. This would eliminate the need for the Court to continuously resolve, on a case-by-case basis, the enforceability of agreements to arbitrate claims under other federal statutes, and remove even more arbitrable cases from the dockets of the lower federal courts.

## I. The Court Should Grant Certiorari to Resolve the Fully Developed Conflict Among the Circuit Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate ERISA Disputes.

The enforceability of agreements to arbitrate commercial statutory disputes pursuant to the Federal Arbitration Act has been definitively resolved by the Court in *Mitsubishi*, *McMahon* and *Rodriguez*.[2] Notwithstanding this precedent, the Circuit Courts of Appeals have rendered conflicting opinions regarding the enforceability of agreements to arbitrate ERISA disputes. The Third Circuit in *Barrowclough* and the Second Circuit in the present case have refused to enforce agreements to arbitrate ERISA disputes. The Eighth Circuit in *Sulit* has enforced agreements to arbitrate ERISA disputes.

Those courts that refuse to enforce valid agreements of parties to arbitrate their ERISA disputes are thwarting the principles

---

[2] *See Mitsubishi* (agreements to arbitrate federal antitrust law claims enforceable); *McMahon* (agreements to arbitrate claims under § 10(b) of the Exchange Act and RICO enforceable); *Rodriguez* (agreements to arbitrate claims under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) enforceable).

articulated by the Court in *Mitsubishi*, *McMahon* and *Rodriguez*. They are also thwarting explicit congressional intent underlying ERISA. When Congress enacted ERISA, it expressly stated that it had no intent to "alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). The Federal Arbitration Act is one example of a law not displaced by ERISA. *See Rosenblum v. Drexel Burnham Lambert, Inc.*, 700 F. Supp. 874, 876 (E.D. La. 1987) ("[T]he express intent of ERISA is not to prevent the application of the arbitration act. . . .")

The conflict among the circuits is fully developed. Since the statutory text and legislative history of ERISA do not even mention arbitration, courts either enforce agreements to arbitrate ERISA disputes under the Court's modern commercial arbitration precedents or refuse to enforce such agreements due to their mistrust of arbitration and misplaced reliance on the Court's labor arbitration precedents.[3] There are no further arguments to be developed. Courts will continue to be burdened with unnecessary motions to compel arbitration and lawsuits asserting claims that should be resolved through arbitration due to the Second and Third Circuits' opinions. The Court should end this waste of judicial resources by granting certiorari to review and reverse the Second Circuit's opinion in this case and protect the congressional policies underlying ERISA and the Arbitration Act.

---

[3] For a complete discussion of the reasons why agreements to arbitrate ERISA disputes are enforceable under the Court's modern commercial arbitration precedents as well as the distinctions between these cases and the Court's labor arbitration precedents, *see* Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Tex. L. Rev. No. 3 (forthcoming Feb. 1990) (hereinafter "Shell, *Commercial Arbitration*"). A copy of this article has been provided to the Court by petitioners in a Lodging submitted along with their petition for a writ of certiorari.

### A. The Second and Third Circuits Have Refused to Enforce Private Agreements to Arbitrate ERISA Disputes Based upon Their Erroneous Belief that Congress Intended to Prohibit Enforcement of Such Agreements and Their Misapplication of the Court's Labor Arbitration Jurisprudence.

The Second and Third Circuits have refused to enforce private agreements to arbitrate claims based on violations of the substantive statutory provisions of ERISA,[4] while enforcing agreements to arbitrate claims to establish or enforce contractual rights to benefits under ERISA, 29 U.S.C. § 1132(a). *See Bird*, 871 F.2d at 298; *Barrowclough*, 752 F.2d at 939-41. Both circuits support their decision to treat statutorily-based ERISA claims differently from contractually-based ERISA claims by relying on outdated cases such as *Wilko v. Swan*, 346 U.S. 427 (1953) which held that statutory claims are not subject to arbitration as well as the fact that Congress provided exclusive jurisdiction in the federal district courts to enforce statutory violations of ERISA, 29 U.S.C. § 1132(e)(1). *See Bird*, 871 F.2d at 297; *Barrowclough*, 752 F.2d at 940 & n.17. The Second Circuit also supports its finding of congressional intent to prohibit arbitration of ERISA disputes on the remedial nature of ERISA and on various procedural provisions of ERISA.[5] Finally, both the Second and Third Circuits rely on the Court's opinions in *Alexander*, *Barrentine* and *McDonald*, finding that the Court "reached a similar conclusion with regard to analogous federal protective statutes." *Barrowclough*, 752 F.2d at 940; *Bird*, 871 F.2d at 297-98. The Court in these cases held that labor arbitration conducted pursuant to a collective bargaining agreement does not preclude a subsequent federal action based on Title VII of the Civil Rights Act

---

[4] A claim for breach of fiduciary duties under 29 U.S.C. § 1104, such as that asserted by respondents herein, is a statutorily-based ERISA claim as opposed to a contractually-based ERISA claim.

[5] *See Bird*, 871 F.2d at 295, 297 (relying on ERISA's remedial nature and its liberal provisions governing service of process, venue, attorneys' fees and statutes of limitations as well as the lack of diversity or amount in controversy requirements, many of which are attributes of all federal statutes).

of 1964, 42 U.S.C. § 2000e *et seq.* (1982) ("Title VII"), the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1982) ("FLSA"), and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982).

The Court has rejected the Second and Third Circuits' rationale for refusing to enforce an agreement to arbitrate a statutory dispute that is covered by the Federal Arbitration Act. Specifically, the Court has unequivocally rejected the notion that claims premised on statutory rights cannot be resolved by arbitration. *See McMahon*, 482 U.S. at 226. The Court has rejected the argument that the existence of an exclusive jurisdiction provision to enforce a statute evidences congressional intent to prohibit a waiver of the judicial forum to enforce rights afforded by the statute. *See McMahon* (agreements to arbitrate § 10(b) claims enforceable notwithstanding the Exchange Act's exclusive jurisdiction provision); *Mitsubishi* (agreements to arbitrate federal antitrust law claims enforceable notwithstanding the federal district court's exclusive jurisdiction over these statutes). The Court has also, on more than one occasion, explicitly rejected the argument that a statute's remedial nature is a basis to render it nonarbitrable. *See McMahon*, 482 U.S. at 240-41 (RICO arbitrable despite its remedial nature); *Mitsubishi*, 473 U.S. at 636-37 (federal antitrust laws arbitrable despite their remedial nature); *see also Bird*, 871 F.2d at 299-300 (Cardamone, J., dissenting) (criticizing majority for relying on ERISA's remedial nature).[5] And the Court in *Mitsubishi* and *McMahon* did not accept the argument that its opinions in *Alexander*, *Barrentine* and *McDonald* precluded arbitration of statutory commercial disputes covered by the Federal Arbitration Act. *See Mitsubishi*, 473 U.S. at 647-51 (Stevens, J., dissenting) (relying on *Alexander*, *Barrentine* and *McDonald*); *see also Brief for Respondents, Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) at 8, 15, 43 (relying on *Alexander*, *Barrentine* and *McDonald*).

---

[5] The Court also rendered agreements to arbitrate claims asserted under § 10(b) of the Exchange Act enforceable in *McMahon* even though it has held the Exchange Act to be a remedial statute. *See Tcherepin v. Knight*, 389 U.S. 332 (1967).

The reliance by the Second and Third Circuits on the Court's labor arbitration decisions contained in *Alexander*, *Barrentine* and *McDonald* is misplaced and frustrates the Court's attempt to treat labor arbitration under a collective bargaining agreement differently than commercial arbitration under the Federal Arbitration Act. The Court has never relied on its labor arbitration precedents in analyzing whether the Federal Arbitration Act mandates enforcement of an agreement to arbitrate a statutory dispute. *See* Shell, *Commercial Arbitration* at 73. The Court has clearly articulated the vast differences between labor and commercial arbitration. Commercial arbitration under the Federal Arbitration Act is a form of trial wherein arbitrators act as fact finders and judges. *See* Shell, *Commercial Arbitration* at 3-4.

In contrast, the Court has recognized that labor arbitration under a collective bargaining agreement is a specialized form of dispute resolution that involves considerations that are not present in commercial arbitration under the Federal Arbitration Act:

> Labor arbitration is at the very heart of the system of industrial self-government. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

The collective bargaining agreements in the Court's labor arbitration cases restricted the power of the arbitrators by limiting them to the resolution of contractual issues through the interpretation of the collective bargaining agreements. These collective bargaining agreements prohibited the arbitrators from addressing statutory issues; in fact, any award which addressed statutory issues would be subject to avoidance because the arbitrator exceeded his authority. *See Alexander*, 415 U.S. at 53-54; *Barrentine*, 450 U.S. at 744-45; *McDonald*, 466 U.S. at 291. As the Court described in *Alexander*, the labor arbitrator's

special role is to interpret and apply a collective bargaining agreement in accordance with the intent of the parties and the "industrial common law of the shop," rather than the requirements of a statute. "Where the collective-bargaining agreement conflicts with [a statute], the arbitrator must follow the agreement." *Alexander*, 415 U.S. at 53, 56-57. Unlike the strict limitations placed on labor arbitrators, commercial arbitrators have the authority to enforce statutory rights and they are fully capable of doing so. This is a primary reason why the Court enforced the agreements to arbitrate the statutory disputes involved in *Mitsubishi*, *McMahon* and *Rodriguez*.

Labor arbitration is also treated differently by the Court than commercial arbitration because a union exclusively controls the manner and extent to which an individual grievance is presented. *Alexander*, 415 U.S. at 58 n.19. The interests of an individual employee, therefore, may conflict with or be subordinated to the collective interests of all employees covered by the agreement. *Id.* In commercial arbitration, private agreements to arbitrate disputes are entered into by an individual who can pursue his own claim and protect his personal interests.

These are the primary reasons why *Alexander*, *Barrentine* and *McDonald* are clearly inapposite to the present case, were not relied on by the Court in *Mitsubishi*, *McMahon* and *Rodriguez*, and should not have been relied on by the Second and Third Circuits. Moreover, the *Alexander* line of cases, unlike the present case, does not analyze or even mention the Federal Arbitration Act, which even the Second Circuit recognizes involves an analysis of ERISA to ascertain whether Congress intended to exempt ERISA from the Federal Arbitration Act. Unlike the Second and Third Circuits, the Eighth Circuit in *Sulit* did not rely on these cases in rendering agreements to arbitrate ERISA disputes enforceable under the Federal Arbitration Act. The Eighth Circuit relied on *Mitsubishi* and *McMahon*. *See Sulit*, 847 F.2d at 477-79. Petitioners presented these arguments to the Second Circuit which chose not to rely on *Mitsubishi* and *McMahon*, but chose to rely on the Third Circuit's outdated opinion in *Barrowclough*.

The Court has clearly rejected the underpinnings of the Second and Third Circuits' holding that agreements to arbitrate ERISA disputes are unenforceable. The Second and Third Circuits are simply out of step with the Court's modern commercial arbitration jurisprudence:

> [The court's] finding of Congressional design is unsupported by [its] citations to ERISA's text or its legislative history--neither source even mentions arbitration. Further, it defies the Supreme Court's pronouncement that our "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on *statutory* rights."

*Bird*, 871 F.2d at 299 (Cardamone, J., dissenting) (citing *McMahon*) (emphasis in original). The Court should grant certiorari to review and reverse the Second Circuit's opinion and remove the possibility that other courts will rely on it.

### B. The Eighth Circuit Has Enforced Agreements to Arbitrate ERISA Disputes in Accordance with Recent Decisions of the Court That Uphold Private Agreements to Arbitrate Commercial Statutory Disputes Pursuant to the Federal Arbitration Act.

The Eighth Circuit in *Sulit* has enforced agreements to arbitrate ERISA disputes. In so doing, it articulated and properly applied the Court's test for construing the arbitrability of a statute by scrutinizing the statutory language and legislative history of ERISA and finding ERISA devoid of any evidence of congressional intent to prohibit enforcement of agreements to arbitrate disputes under the statute. The Eighth Circuit found no conflict between arbitration of ERISA claims and the statute's purposes that would undermine the suitability of arbitration to enforce ERISA rights, and further found arbitrators to be "readily capable" of resolving ERISA disputes. *Sulit*, 847 F.2d at 479.

The Second Circuit was fully aware of the Eighth Circuit's opinion in *Sulit* and explicitly disagreed with it, choosing instead to rely on the Third Circuit's outdated opinion in *Barrowclough*. *See Bird*, 871 F.2d at 298 n.8. The result is a clear and direct conflict among the circuits, all of which have reviewed the same legal arguments. This conflict is mirrored by a conflict among the district courts on the issue. *See Rosenblum*, 700 F. Supp. at 876-77 (agreements to arbitrate ERISA claims enforceable); *Iacono v. Drexel Burnham Lambert, Inc.*, No. 88-0686 L (D.R.I. June 8, 1989)(Lexis, Fedsec library, Courts file)(ERISA claim ordered to arbitration); *but see Gorinsky v. Bear, Stearns & Co.*, No. 89 Civ. 1224 (MBM)(S.D.N.Y. May 2, 1989)(Lexis, Fedsec library, Courts file)(agreements to arbitrate statutory violations of ERISA unenforceable based on *Bird*).

The Court should grant certiorari to review and reverse the Second Circuit's opinion in the present case and resolve the significant conflict among the Circuit Courts of Appeals in a manner consistent with the Court's arbitration precedents.

## II. Should the Court Grant Certiorari to Resolve the Conflict Regarding the Arbitrability of ERISA Disputes, It Will Also Have the Opportunity to Clarify the Distinctions Between Its Commercial and Labor Arbitration Precedents and Avoid the Need to Address the Arbitrability of Other Federal Statutes on a Case-By-Case Basis.

The Court has the opportunity in the present case to resolve an additional conflict among the Circuit Courts of Appeals apart from the conflict surrounding the enforceability of agreements to arbitrate ERISA disputes. In addition to the conflict among the circuits regarding the applicability of the Court's labor arbitration cases to the enforceability of agreements to arbitrate ERISA disputes, the lower courts are divided as to the applicability of these cases to other statutory disputes that are the subject of commercial arbitration agreements.[7] The lower federal courts, for example, have rendered conflicting opinions as to whether the Court's labor arbitration cases preclude enforcement of private commercial agreements to arbitrate disputes under the Age Discrimination in Employment Act of 1967, 29 U.S.C.§ 621 *et seq.* (1982)("ADEA") which are subject to the Federal Arbitration Act and do not involve labor arbitration held under a collective bargaining agreement.[8] Courts have also reached conflicting opinions regarding the enforceability

---

[7] Should the Court grant certiorari in the present case to resolve the conflict among the circuits surrounding the enforceability of agreements to arbitrate ERISA disputes, it does not have to resolve the broader issue regarding the applicability of its labor arbitration precedents to agreements to arbitrate other statutory disputes covered by the Federal Arbitration Act, although petitioners respectfully suggest that it do so.

[8] *See Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989)(ADEA claims nonarbitrable in a non-collective bargaining setting); *see also Burte v. Shearson Lehman/American Express, Inc.*, No. 86 Civ. 2392 (VLB) (S.D.N.Y. May 3, 1989), *appeal pending*, No. 89-7554 (2d Cir. 1989); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987); *Gilmer v. Interstate Securities Corp.*, No. C-C-88-0396-M (W.D.N.C. Jan. 17, 1989), *appeal pending*, No. 88-1796 (4th Cir. 1989); *Jones v. Baskin, Flaherty, Elliot & Mannino,*

*(footnote continued)*

of agreements to arbitrate other statutes in light of the Court's labor arbitration cases.[9]

The conflict among the circuits regarding the proper application of the Court's labor arbitration precedents is clear, direct and fully developed. Courts either strictly apply this line of cases to labor arbitration held under a collective bargaining agreement or apply it to any agreement to arbitrate a statutory dispute, including private agreements under the Federal Arbitration Act which are governed by the Court's commercial arbitration precedents.[10]

---

*(footnote continued)*
670 F. Supp. 597, 604 (W.D. Pa. 1987); *but see Pihl v. Thomson McKinnon Securities Inc.*, No. 87-7632 (E.D. Pa. May 25, 1988) (Lexis, Fedsec library, Courts file) (ADEA claims arbitrable in non-collective bargaining setting under Federal Arbitration Act and *McMahon*); *Garfield v. Thomson McKinnon Securities, Inc.*, No. 88 C 3027 (N.D. Ill. Dec. 16, 1988); *Nicholson*, 877 F.2d 221 (3d Cir. 1989) (Becker, J., dissenting).

[9] *See Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (1989) (*Alexander, Barrentine* and *McDonald* render Title VII and Minnesota Human Rights Act claims outside collective bargaining setting nonarbitrable); *see also Utley v. Goldman, Sachs & Co.*, 49 Empl. Prac. Dec. (CCH) ¶ 38,701 (D. Mass. Jan. 17, 1989), *appeal pending*, No. 89-1218 (1st Cir. 1989) (Title VII claims subject to Federal Arbitration Act in non-collective bargaining setting nonarbitrable); *Alford v. Dean Witter Reynolds, Inc.*, 712 F. Supp. 547 (S.D. Tex. 1989) (*Swenson* rationale followed and Title VII claims nonarbitrable in non-collective bargaining setting despite *Mitsubishi* and *McMahon* rationale); *DeScpio v. Josephthal & Co.*, 540 N.Y.S.2d 932 (1988) (followed *Alexander* and *Swenson* in holding claims under § 296 of the New York Human Rights Law nonarbitrable in non-collective bargaining setting, rejecting *Mitsubishi* and *McMahon*); *but see Steele v. L.F. Rothschild & Co.*, 701 F. Supp. 407 (S.D.N.Y.), *appeal dismissed*, 864 F.2d 1 (2d Cir. 1988) (claims under the FLSA arbitrable under *Mitsubishi, McMahon* and Federal Arbitration Act, rejecting *Barrentine*'s applicability in non-collective bargaining setting); *Bruno v. Prudential-Bache Securities Inc.*, No. E005087 (Cal. Ct. App. Nov. 28, 1988) (state law claims of sexual discrimination arbitrable under Federal Arbitration Act in non-collective bargaining setting).

[10] The Court has been asked in another case to resolve the issue of whether the Federal Arbitration Act applies to claims under Title VII and the Minnesota Human Rights Act, Minn. Stat. § 363.06, when an arbitration agreement is not contained in a collective bargaining agreement. *See* Petition for Writ of Certiorari, *Management Recruiters Int'l, Inc. v. Swenson*, No. 89-42 (July 10, 1989).

Should the Court grant certiorari in this case, it can guide the lower courts as to the proper application of its commercial arbitration precedents and its labor arbitration precedents to statutory disputes, and thereby foreclose continued unnecessary litigation on this issue.[11] Once the lower courts receive such guidance from the Court, the Court will no longer have to address the arbitrability of other federal statutes on a case-by-case basis. Furthermore, arbitrable cases involving this issue will be removed from the overcrowded dockets of the lower courts as those courts enforce valid agreements of parties to arbitrate their statutory disputes.

## III. The Issues Presented to the Court Require Early Resolution to Avoid Increased Congestion and Provide Uniformity Throughout the Lower Courts as well as to Avoid Duplicative Proceedings Between Parties to a Dispute.

The enforceability of agreements to arbitrate ERISA disputes will continue to be the subject of motion and appellate practice consuming unnecessary amounts of judicial resources until it is resolved by the Court. The lower courts are already congested, and this congestion is one of the most serious problems facing the federal judiciary today.[12] The Administrative Office of the United States Courts reported that 239,634 total civil cases and 43,503 total criminal cases were commenced in 1988 alone. *See* Annual Report of the Director of the Administrative Office of the United States Courts (1988) at 12, 17.

---

[11] Petitioners do not suggest that the *Alexander* line of cases be overruled. Petitioners recognize that these cases govern labor arbitration held under a collective bargaining agreement, and merely request that the Court clarify the applicability of these cases to private commercial agreements to arbitrate disputes under the Federal Arbitration Act in a non-collective bargaining setting.

[12] *See* Speech by Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association on August 31, 1985, reported by UPI on the same date; Speech by Chief Justice Warren E. Burger at New York University on November 18, 1982, reported in the Christian Science Monitor on November 24, 1982.

There were a total of 6,704 ERISA suits in 1988. *Id.* at 10. The Director of the Administrative Office of the United States Courts reported that the filings of ERISA suits in 1988 represented a "notable increase" of 625 cases from 1987 when 6,079 ERISA suits were filed.[13] *Id.* Additionally, there are millions of ERISA accounts maintained with brokerage firms nationwide. The Second and Third Circuits' opinions leave open the potential for suits premised on losses occuring in any of these accounts to serve as the basis for a federal court action. It makes little sense to have the federal courts, whose dockets are already overly crowded, resolve disputes of parties who have agreed to arbitrate at a forum which the Court in *McMahon* has already ruled to be fully capable of resolving statutory disputes.

An express declaration by the Court that its modern commercial arbitration jurisprudence mandates enforcement of private agreements to arbitrate ERISA disputes will eliminate another source of waste – the maintenance of duplicative proceedings in separate forums. The Court's opinions in *Byrd*, *McMahon* and *Rodriguez* require courts to enforce agreements of parties to arbitrate claims asserted under state and common law, the federal securities laws and RICO. Those courts that refuse to enforce agreements of parties to arbitrate an ERISA claim asserted in the same lawsuit as these other claims will require parties to litigate the ERISA claim in court while simultaneously arbitrating the other claims, even though arbitrators are fully capable of resolving ERISA disputes:

> We do not find either in the purposes of the statute or in [*McMahon*] a compelling basis to treat

---

[13] ERISA disputes filed in the district courts number approximately twice the amount of federal securities law disputes that were filed in 1987 and 1988. In 1987, a total of 2,844 "Securities, Commodities, and Exchange" private civil actions were filed in the district courts during the twelve month period ended June 30, 1987. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 (1987). A total of 2,439 similar suits were filed in the district courts during the twelve month period ended June 30, 1988. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 (1988).

> agreements to arbitrate ERISA claims differently from those cases in which the Supreme Court has enforced agreements made between private parties to arbitrate antitrust, Exchange Act, and RICO claims. Like other essentially fact-based claims for fiduciary mismanagement, we believe arbitrators "are readily capable of handling the factual and legal complexities" of ERISA claims, *see* [*McMahon*], and that those claims are not by their nature beyond the ken of arbitrators.

*Sulit*, 847 F.2d at 479. When all of these claims are based on the same underlying factual allegations, these types of parallel and duplicative proceedings are extremely wasteful. The present case is illustrative. Under the Second Circuit's opinion, the parties must litigate their ERISA dispute in court while simultaneously resolving their § 10(b) dispute in an arbitration forum even though both claims are premised on respondents' assertion that petitioners entered into excessive, unauthorized and unsuitable transactions for the Trust account.

Only explicit congressional intent should prohibit enforcement of an agreement to arbitrate a statutory dispute and require the expenditure of the time and resources required by litigation in a judicial forum. The Second and Third Circuits have failed to rely on any such intent. The Court should grant certiorari and direct the lower courts to apply its modern commercial arbitration jurisprudence to ERISA, thereby rendering agreements to arbitrate ERISA disputes enforceable and removing these cases from the federal court dockets. Should the Court clarify the distinctions between its labor arbitration precedents and its commercial arbitration precedents, the impact of its decision will extend beyond ERISA and result in even more arbitrable cases being removed from the dockets of the courts.

## CONCLUSION

For all of the foregoing reasons, petitioners respectfully request the Court to issue a writ of certiorari in this case to review and reverse the decision of the United States of Appeals for the Second Circuit.

DATED: New York, New York
August 7, 1989

THEODORE A. KREBSBACH
*Counsel of Record for Petitioners*

Office of the General Counsel
Shearson Lehman Hutton Inc.
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
*Of Counsel*

# APPENDIX

## APPENDIX A

## STATUTORY PROVISIONS INVOLVED

*United States Arbitration Act*

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

*Employee Retirement Income Security Act*

29 U.S.C. § 1001. Congressional findings and declaration of policy

**(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries**

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1104. Fiduciary duties

**(a) Prudent man standard of care**

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

**(b) Indicia of ownership of assets outside jurisdiction of district courts**

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

**(c) Control over assets by participant or beneficiary**

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any

breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132. Civil enforcement

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1144. Other laws

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 498 August Term, 1988

(Argued February 3, 1989 Decided March 28, 1989)

Docket No. 88-7704

---

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

*Plaintiffs-Appellees,*

v.

SHEARSON LEHMAN/AMERICAN EXPRESS, INC., and RAYMOND R. CLEMENTS,

*Defendants-Appellants.*

---

Before:

KAUFMAN, TIMBERS, and CARDAMONE, *Circuit Judges.*

Appeal from an order of the United States District Court for the District of Connecticut, Jose A. Cabranes, *J.*, denying appellants' motion to stay proceedings pending arbitration of appellees' claim pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1985)("ERISA").

Affirmed.

Judge Cardamone dissents in a separate opinion.

DONALD R. HOLTMAN, Hartford, Connecticut (Lester A. Katz, Katz & Seligman, Hartford, Connecticut, *of counsel*), *for Plaintiffs-Appellees.*

JEFFREY L. FRIEDMAN, New York, New York (Theodore A. Krebsbach, Shearson Lehman Hutton Inc., Office of the General Counsel, New York, New York, *of counsel*), *for Defendants-Appellants.*

KAUFMAN, *Circuit Judge:*

We are asked to determine whether a statutory claim created by the Employee Retirement Income Security Act (ERISA) is subject to compulsory arbitration. Because Congress envisioned a judicial forum, particularly a federal court, as the central arena for implementing ERISA's underlying purpose – providing maximum protection to pension plan participants and beneficiaries – we hold that statutory ERISA claims are not compulsorily arbitrable.

Briefly, the background of this case is as follows. Appellants, Shearson Lehman/American Express ("Shearson")[1] and Raymond Clements, a Shearson Vice President, allegedly solicited Frank L. Bird, as trustee of the Frank L. Bird Profit Sharing Trust (the "Trust" or "Pension Plan"), to invest the assets of the Trust with them. Like his co-appellee, Joan Shea, Bird is also a participant and beneficiary of the Trust. Bird claims that during the first meeting with Clements, he emphasized that, because the Trust was a retirement fund, its investment objectives were long-term growth and safety of the corpus. Clements allegedly also knew that Bird was an unsophisticated investor who would rely on Shearson's skill and experience in investing securities.

Upon opening the account, Bird, in his capacity as trustee, signed Shearson's standard "Customer's Agreement." The

[1] Now known as Shearson Lehman Hutton, Inc.

contract contained a broad arbitration clause, under which Shearson's clients foreswore recourse to the courts.[2] Bird invested assets of the Trust totalling $62,205.56. After 55 transactions over a 22 month period, it is alleged the account entrusted to Clements and Shearson dwindled to a value of $13,427.53. Many of the purchases and sales, it is claimed, included high risk investments such as airline securities, warrants and options. Each transaction generated commissions for appellants and some yielded interest on margin advances.

Specifically, the complaint charged that appellants' conduct constituted a breach of fiduciary duties under ERISA, 29 U.S.C. § 1104, and "churning," excess trading of an account in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5, 17 C.F.R. § 240-10b-5. Instead of submitting the claims to arbitration, appellees brought this action in the District of Connecticut.[3] On the basis of the arbitration provision, Clements and Shearson moved to stay the district court proceedings pending arbitration of the ERISA and securities claims.

---

[2] The provision reads:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators [sic] may be entered in any court having jurisdiction thereof. This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an expressed or implied right of action under certain of the federal securities laws.

[3] All substantive ERISA claims may be brought only in the federal district court. 29 U.S.C. § 1132(e)(1). Suits to recover benefits due or to enforce rights under the terms of a particular plan may also be brought in state courts. Id.

In a ruling from the bench, Judge Cabranes found that because the arbitration clause was valid and binding upon Bird and Shea, the claims asserted pursuant to the 1934 Act were to be resolved by arbitration. The court determined, however, that the arbitration provision did not obligate appellees to arbitrate the ERISA claim.[4] We are of the view that claims asserting substantive ERISA violations can be brought in a federal forum notwithstanding an agreement to arbitrate.

Before reaching the arbitrability of ERISA claims, we consider other contentions of the parties. In *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840 (2d Cir. 1987), we set forth the factors to be considered on an application to compel arbitration. We must determine whether a valid arbitration agreement existed and, if so, the scope of that agreement. *Id.* at 844. Then, an assessment is made whether Congress intended the applicable claims to be nonarbitrable. *Id.* If only some of the claims are arbitrable, the court decides whether to stay the balance of the proceedings pending arbitration. *Id.*

We agree with the district court's determination that a valid arbitration agreement which bound all the parties continued in being. Seeking to free nonsignatories from the terms of the customer agreement, appellees argued that Bird lacked the authority to compel all of the participants and beneficiaries of the Trust to abide by the arbitration clause. The court properly noted, however, that Bird, as trustee, could bind all participants and beneficiaries of the Trust to arbitration of "any controversy arising out of or relating to" the Trust. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 938 (3d Cir. 1985); *Fisser v. Int'l Bank*, 282 F.2d 231, 233-234 (2d Cir. 1960).

---

[4] The issue of the compulsory arbitrability of ERISA claims is before us on Judge Cabranes's certification for appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5(a) of Federal Rules of Appellate Procedure. In reviewing the district court's order, we are not bound by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. A denial of a motion to compel arbitration is subject to *de novo* review. *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).

The Supreme Court recently determined that the legislative intent underlying the Securities Exchange Act of 1934 did not bar compulsory arbitration of securities claims pursuant to section 10(b). *Shearson Lehman/American Express v. McMahon*, 482 U.S. 220 (1987). Accordingly, we affirm the district court's decision to compel arbitration of appellees' securities claims.[5]

We now turn to the question whether Congress intended to afford non-waivable access to a federal court for those asserting statutory violations of ERISA. In considering this issue, a discussion of the development of arbitrability doctrine will be helpful.

Although the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1988) ("Arbitration Act"), is "a congressional declaration of a liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), it is, nevertheless, subject to a showing "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 225. The arbitrability of statutory claims is thus essentially a question whether, in enacting the statute upon which the claim is based, Congress intended the federal courts to be the exclusive forum for resolving disputes of substantive rights.

The requisite intent "will be deducible from [the act's] text or legislative history," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth. Inc.*, 473 U.S. 614, 628 (1985), or "from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 225. The burden of demonstrating this intent is on the party opposing arbitration. *Id.*

When enacting remedial legislation, Congress has limited or prohibited waiver of a judicial forum. Most often these injunctions occur in statutes designed to provide minimum substantive guarantees. *See. e.g., Barrentine v. Arkansas-Best Freight*

---

[5] The court below also correctly determined that the final sentence of the arbitration provision did not remove appellees' securities claims from the ambit of the agreement to arbitrate. Rather, that statement was merely a disclosure required by the Securities and Exchange Commission. *See* 17 C.F.R. § 240.15c2-2; *Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1510 (S.D.N.Y. 1985).

*System*, 450 U.S. 728, 737 (1981). In *Barrentine*, the Supreme Court concluded that claims asserted pursuant to minimum wage provisions of the Fair Labor Standards Act were not compulsorily arbitrable and could be maintained in federal court, notwithstanding an arbitration clause in the underlying collective bargaining agreement and an adverse ruling by a neutral arbitrator. 450 U.S. at 728. The Court declared: "[D]ifferent considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* at 737.

In making this statement, Justice Brennan referred to policy considerations espoused by Justice Powell, writing for a unanimous Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Despite an adverse arbitration decision, the Court held an individual could bring a wrongful termination claim under Title VII of the Civil Rights Act of 1964. *Id.* Justice Powell stated: "The purposes and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id.* at 56. Indeed, he noted, "[t]his conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation." *Id.* at 56-57. The remedial intent of Congress tempers the right to privately order one's affairs.

In a more recent and unanimous pronouncement, the high court concluded that federal courts were not to accord preclusive effect to unappealed arbitration awards in suits brought pursuant to 42 U.S.C. § 1983. *McDonald v. City of West Branch*, 466 U.S. 284 (1984). Justice Brennan offered a partial list of considerations supporting the Court's conclusion: an arbitrator may not possess the requisite expertise "to resolve the complex legal questions that arise in § 1983 actions"; because an arbitrator's authority derives solely from the contract, he may not have the authority to enforce § 1983; when the union has control over the grievance procedure, the interests of the union and those of the individual employee may conflict; and "arbitral factfinding is generally not equivalent to judicial factfinding." *Id.* at

290-91. These considerations illustrate the multifaceted concerns underlying Congress's desire to allow resolution of certain federal substantive rights in an Article III forum.[6]

Prior to the establishment of ERISA, pension issues were generally held arbitrable. *See* Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 Colum.J.L. & Soc. Probs. 269, 276-77 (1980). But, in response to injustices in the treatment of pension plan participants, Congress created a federal legal remedy. The text of ERISA enumerates several of the most prominent problems and concerns. Congress determined that:

> . . . [M]any employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .

29 U.S.C. § 1001(a).

The source of these ills, in the statute's words, was often "the lack of employee information and adequate safeguards concerning . . . operation" of the plans. *Id.*

Consequently, Congress stated:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their

---

[6] Following these general principles, claims pursuant to statutes not evincing a Congressional intent to preclude arbitration have been held compulsorily arbitrable. *See, e.g., McMahon*, 482 U.S. 220 (1987) (claims under the Securities Exchange Act of 1934 arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (federal antitrust issues arbitrable); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) (lower federal courts may not stay arbitration pending resolution of the non-arbitrable claims by the court).

> beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, *and ready access to the Federal courts*. [Emphasis added].

29 U.S.C. § 1001(b)(1982).

The federal courts have consistently interpreted ERISA as a remedial statute designed to "curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards." *Taggert Corp. v. Efros*, 475 F. Supp. 124 (D. Tx. 1978). In *Pompano v. Michael Schiavone & Sons. Inc.* 680 F.2d 911, 914 (2d Cir. 1982), we stated, "A reading of the statute's legislative history compels the conclusion that ERISA's purpose is to secure guaranteed pension payments to participants by insuring the honest administration of financially sound plans." *See, e.g., United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada Local 198 AFL-CIO Pension Plan v. Myers*, 488 F. Supp. 704 (M.D. La. 1980), *aff'd*, 645 F.2d 532 (5th Cir. 1981).

In addition to the panoply of substantive rights and protections, Federal court access for pension claimants and beneficiaries was explicitly included as a key ingredient of the solution. That Congress envisioned the federal courts as the central forum for enforcement of the statute is the inescapable conclusion from the plain meaning of the wording of ERISA. Section 1001(a) unequivocally stated that to enforce its substantive terms, ERISA mandated "ready access to the federal courts." Access to a federal judicial forum has been construed as essential to assuring the minimum standards guaranteed pension participants by ERISA. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 941 (3d Cir. 1985) ("[statutory ERISA] rights may not be foreclosed by a contractual arbitration agreement."); *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984) ("[w]e do not believe Congress intended that these minimum standards [set forth in ERISA] could be eliminated by contract.");

*Senco of Florida, Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979) (intent of Congress in enacting [ERISA] was to protect employees and their families from bargaining away benefits provided by pension plans); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977) ("in passing ERISA Congress intended to protect plan participants from arbitration and similar agreements, often unilaterally imposed, which 'snip and whittle' at federally granted rights").

ERISA's liberal provisions governing service of process, venue, attorney fees and statutes of limitation also provide persuasive evidence that Congress intended disputes under the statute to be resolved in a federal judicial forum. *Cf.*, *Barrentine*, 450 U.S. at 740. Section 1132(a)(3) specifically empowers any participant or beneficiary of a plan to bring a civil action for any violation of the statute, including breach of fiduciary duties imposed by 29 U.S.C. § 1104. Moreover, a wide choice of venue is allowed. 29 U.S.C. § 1132(e)(2). There are no diversity or amount in controversy requirements. *Id.* at § 1132(f). Courts may award attorneys fees to successful participants and beneficiaries. *Id.* at § 1132(g). And, under some circumstances, the Secretary of Labor may maintain an action on behalf of a participant or beneficiary. *Id.* at 1132(a)(5) & (b)(1). Congress clearly sought to lower the barriers that might otherwise restrict access to the federal courts.

These jurisdictional provisions also distinguish between suits brought to redress violations of substantive provisions of ERISA and actions to declare the rights of those covered and benefits due under a particular pension plan. Claims which are basically issues of contract law are within the concurrent jurisdiction of federal and state courts, while violations of the ERISA statute itself are exclusively the province of the federal courts. *See* 29 U.S.C. § 1132(e). Although this division indicates that not every dispute concerning an ERISA regulated plan must be heard in federal court, it in no way obfuscates the clarity of Congress's intent to make a judicial forum available.

In *Barrowclough v. Kidder, Peabody & Co.*, the Third Circuit concluded that in enacting § 1132(e), Congress intended

to follow the model of § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1978), which governs suits arising under a collective-bargaining agreement. 752 F.2d at 936. Indeed, the House Conference Report refers to § 301 in outlining the proposed structure of § 1132(e).[7] Section 301 provides that the applicable law for the breach of a collective bargaining agreement is federal common law. *See Local 174 Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 101-04 (1962). The importance of federal labor policy and the necessity for uniformity of its application made the development of federal law governing such disputes imperative. *Id.* at 103-04. With the prologue that Congress deemed employee pension plan law "affected with a national public interest," 29 U.S.C. § 1001(a), the same reasoning requires the development of federal common law in this area. *See Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Barrowclough*, 752 F.2d at 936.[8]

---

[7] The Conference Report reads:

> The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I. However, with respect to suits to enforce benefit rights under the plan . . . which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. The U.S. district courts are to have jurisdiction of these actions without regard to the amount in controversy and without regard to the citizenship of the parties.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5107.

[8] Appellants rely on *Sulit v. Dean Witter Reynolds*, 847 F.2d 475 (8th Cir. 1988), for the proposition that arbitration agreements are enforceable in the context of statutory ERISA claims. But, the key issue before the Eighth Circuit in that case was whether 29 U.S.C. § 1110(a) constituted a "no-waiver"

*(footnote continued)*

We do not suggest that arbitration of purely contractual claims asserted pursuant to ERISA cannot be compelled. Suits to establish or enforce rights to benefits that are independent of claims predicated on substantive violations of ERISA are appropriately resolved through arbitration. *See Air Line Pilots Ass'n v. Northwest Airlines. Inc.*, 627 F.2d 272, 275-76 (D.C. Cir. 1980). The parallel between § 1132(a) and § 301 of LMRA suggests Congress intended these contractual pension claims to remain subject to arbitration in the same manner that claims for breach of a collective-bargaining agreement have been held to be. *See Barrowclough*, 752 F.2d at 939.[9]

We conclude, therefore, that a federal judicial forum cannot be cut off to those asserting claims created as part of a comprehensive federal scheme protecting the rights of individual participants or beneficiaries of a pension plan and which fall within the exclusive jurisdiction of the federal courts. Accordingly, we affirm.

---

*(footnote continued)*
provision prohibiting enforcement of agreements relinquishing access to the federal courts provided by the statute. *Id.* The panel relied on *McMahon*, *supra*, which held that a similar provision in the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), did not block arbitration of substantive claims under that statute. However, to the extent the *Sulit* court could "find no hint in the legislative history" of Congress's intent that substantive ERISA claims not be subject to compulsory arbitration, we disagree.

[9] The district court properly determined that the arbitration and the federal litigation should proceed concurrently. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

CARDAMONE, *Circuit Judge*, dissenting:

Because I think the majority's affirmance rests on both a mistaken view of the role of arbitration, one which the Supreme Court has recently abandoned, and on an incorrect inference it draws from Congressional purpose, I respectfully dissent.

The majority says that it recognizes the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This policy, which provides that a party who agrees to arbitrate is bound to that agreement, absent fraud or duress. *See Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987). This rule has been codified as the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), and creates a presumption permitting arbitration that the majority ignores. The exception to the ability to agree to arbitration is found when Congress creates a right that it wants vindicated in court, and thus prohibits a waiver of that forum. In those cases arbitration is barred. As the party seeking to avoid arbitration, Bird bears the burden of establishing Congress' purpose to exclude ERISA from the Arbitration Act. This purpose must be discernible from the text of ERISA, or its legislative history, or its underlying policies. *See McMahon*, 107 S. Ct. at 2337. In my view, Bird has failed to meet this burden.

The linchpin of the majority's position is the distinction it draws between contractual rights relating to an ERISA plan — that can be brought in either federal or state court — and statutory rights created by ERISA which, the majority believes, may only be brought in federal court. Hence, it emphasizes the statutory nature of the rights that Bird asserts. The majority correctly notes that if a plaintiff *goes to court* to enforce a right created by ERISA, rather than by the pension plan, federal jurisdiction is exclusive rather than concurrent. *See* 29 U.S.C. § 1132(e). It then seems to take a leap in logic to a proposition with which I am unable to agree: Congress' preference for federal courts to state courts in the above instance compels the conclusion that Congress also prefers federal courts over arbitration tribunals, so much so that private parties cannot contract to the contrary.

This finding of Congressional design is unsupported by the majority's citations to ERISA's text or its legislative history — neither source even mentions arbitration. Further, it defies the Supreme Court's pronouncement that our "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on *statutory* rights." *McMahon*, 107 S. Ct. at 2337 (emphasis added); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 625-27 (1985) (stating that presumption of arbitrability applies to statutory claims); *Local 210, Laborers Intern. v. Labor Relations Div. Assc'd Gen. Contractors of America*, 844 F.2d 69, 74 (2d Cir. 1988) (dictum).

Obviously, this is not to say that all statutory claims must be arbitrable — Congress may require exclusive federal court jurisdiction. *See Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 742, 745 (1981) (holding that Congress envisioned a plaintiff who loses compulsory arbitration may still bring federal court claim arising under the Fair Labor Standards Act, 29 U.S.C. § 201, particularly because unions that represent plaintiffs in arbitration may not always do so vigorously). But it does not follow that from the presence of a federal statutory right, and the existence of a federal judicial forum with "ready access" to it, that plaintiffs are mandated to use that forum exclusively. *See McMahon*, 1076 S. Ct. at 2338 (stating that the exclusive jurisdiction provision of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), is waivable by compulsory arbitration agreement). There is no suggestion in the statute or the circumstances leading to its enactment that when Congress gave ERISA plaintiffs "ready access" to the federal courts, it was issuing an invitation to plaintiffs that they could not refuse.

In an effort to portray "an inherent conflict between arbitration and the statute's underlying purposes," *McMahon*, 107 S. Ct. at 2337, the majority characterizes ERISA as a "remedial" statute, and then sets forth a number of reasons why Congress enacted ERISA. Concededly, the legislative goal of protecting pension fund participants and beneficiaries is laudable. But that does not answer the question of what means a party may select to vindicate those statutory rights. *Cf. Mitsubishi*, 473 U.S. at

628 (stating that a party who agrees to arbitrate does not forego substantive rights under a statute, but merely alters the means of resolving the dispute). Simply labeling ERISA as "remedial" is insufficient, it seems to me, to rebut the heavy presumption in favor of freedom of contract to arbitrate, particularly as the High Court has sustained the validity of compulsory arbitration agreements under other "remedial" statutes. *See McMahon*, 107 S. Ct at 2345 (describing the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1982), as remedial, but nonetheless enforcing compulsory arbitration agreement); *Mitsubishi*, 473 U.S. at 637 (holding that enforcement of compulsory arbitration provision would not prevent the Clayton Act, 15 U.S.C. § 15, from serving its remedial function).

In the final analysis, what remains of my colleagues' underlying premise must be that Congress could not have envisioned arbitration of ERISA's remedial statutory rights because arbitrators are not up to the task. Yet, that assumption appears untenable too. *See McMahon*, 107 S. Ct. at 2340; *Mitsubishi*, 473 U.S. at 633. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Moses H. Cone Memorial Hosp.* 460 U.S. at 24.

Here, Bird signed a contract agreeing to submit his disputes to arbitration. Because there is no hint that Congress planned to deprive him of that option, he should be held to the bargain he made. *See McMahon*, 107 S. Ct at 2346; *Mitsubishi*, 473 U.S. at 640. I would adopt the approach of the Eight Circuit in *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 47 (8th Cir. 1988) (enforcing agreement for compulsory arbitration of ERISA claim), in light of our duty to "rigorously enforce agreements to arbitrate." *See Dean Witter Reynolds, Inc.*, 470 U.S. at 221.

Accordingly, I vote to reverse the order denying appellant's motion to compel arbitration, and to remand to the district court for it to direct that the agreement to arbitrate be enforced.

## APPENDIX C

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of May, one thousand nine hundred and eighty-nine.

---

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

Plaintiffs-Appellees.

-v.-

SHEARSON LEHMAN/AMERICAN EXPRESS, INC., and RAYMOND R. CLEMENTS,

Defendants-Appellants.

---

DOCKET NUMBER 88-7704

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellants SHEARSON LEHMAN ET AL.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Judge Cardamone dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| FRANK L. BIRD, TRUSTEE of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, INDIVIDUALLY, and JOAN SHEA, | : | |
| Plaintiffs, | : | |
| vs. | : | |
| SHEARSON LEHMAN/AMERICAN EXPRESS, INC. and RAYMOND R. CLEMENTS, | : | CIVIL H-87-530 (JAC) |
| Defendants. | : | |

APRIL 4, 1988
NEW HAVEN, CONNECTICUT

B E F O R E:
HON. JOSE A CABRANES, U.S.D.J.

*RULING OF THE COURT*

*A p p e a r a n c e s:*

*For the Plaintiffs:*

LESTER KATZ, ESQ.
Katz & Seligman
130 Washington Street
Hartford, Connecticut 06106

*For the Defendants:*

KEVIN McCANN, ESQ.
Tyler, Cooper & Alcorn
City Place
Hartford, Connecticut 06103

Paul Collard
Official Court Reporter.

THE COURT: Thank you. Please be seated.

The Court is prepared to rule now on the pending Motion to Compel Arbitration, based upon a consideration of the full record of this case, including the arguments of counsel at today's hearing.

In Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987), the Supreme Court reaffirmed that The Federal Arbitration Act, 9 U.S.C. sections 1 et seq., "standing alone, mandates enforcement of agreements to arbitrate statutory claims." Id. at 2337.

Our Court of Appeals has set forth the issues to be addressed by a district court upon a motion to compel arbitration: "first, (the court) must determine whether the parties agreed to arbitrate . . .; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable . . .; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987).

As to the first factor—whether the parties agreed to arbitrate—plaintiffs contend that, as Trust participants and beneficiaries, they did not sign the Customer Agreement and thus were not parties to the arbitration agreement.

As Trustee, however, Frank L. Bird had the authority to bind the participants and beneficiaries to arbitration of "any controversy arising out of or relating to" the Trust Account. See Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 928 (3d Cir. 1985) (observing that "a variety of non-signatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles"); Fisser v. International Bank, 232 F.2d 231, 233-34 (2d Cir. 1960); Steinberg v. Illinois Co., Inc., 635 F.Supp. 615, 617 (N.D. Ill. 1986).

The Court finds, therefore, that plaintiffs agreed to arbitrate.

The second issue to be addressed is the scope of the agreement. The final sentence of the arbitration provision reads:

"This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an expressed or implied right of action under certain of the federal securities laws."

Relying on this final sentence, plaintiffs contend that their claims brought under the federal securities laws, namely section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. section 78j and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.P. section 240-10b-5, are not within the scope of the agreement.

The Court finds, however, that this provision of the arbitration agreement was simply a disclosure statement mandated by Rule 15c2-2 of the Securities and Exchange Commission, 17 C.F.R. section 240.15c2-2. See Fisher v. Prudential-Bache Securities, Inc., 635 F.Supp. 234, 236-37 (S.D.N.Y. 1986); Finkle and Ross v. A.G. Becker Paribas, Inc., 632 F.Supp. 1505, 1510 (S.D.N.Y. 1985).

The third factor to be considered is whether Congress intended plaintiffs' claims under section 10(b) and ERISA to be nonarbitrable.

The United States Arbitration Act, 9 U.S.C. sections 1-14, constitutes "a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

To override the Arbitration Act, the party opposing arbitration must "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." McMahon, 107 S.Ct. at 2337. Such an intent may be deduced from the statute's text or legislative history, or from an inherent conflict

between arbitration and the statute's underlying purpose. See Id. The Supreme Court has resolved the issue with respect to section 10(b) by holding that agreements to arbitrate claims under that statute are enforceable. See id. at 2343.

With respect to statutory claims under ERISA, however, this Court comes to a different conclusion. While recognizing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitrability," Moses H. Cone Memorial Hospital, 460 U.S. at 24-25, the Court nevertheless concludes that access to a federal judicial forum is central to ERISA's underlying purpose to provide maximum protection to plan participants and beneficiaries. See 29 U.S.C. section 1001(b) (stating congressional policy to provide "ready access to the Federal courts"); see also Barrowclough, 752 F.2d at 936 (holding that statutory claims are not arbitrable under ERISA); Lewis v. Merrill Lynch, 431 F.Supp. 271, 276 (E.D.Pa. 1977) (finding that "in passing ERISA Congress intended to protect plan participants from arbitration and similar agreements, often unilaterally imposed, which 'snip and whittle' at federally granted rights").

This policy of "ready access" can also be discerned in ERISA's provision for exclusive federal court jurisdiction over claims alleging statutory violations and its liberal rules governing service of process, venue, attorney fees and statutes of limitation. See Murphy, The Impact of ERISA on Arbitration, 32 Arb. J. 123, 129 (1977); see also Schneider, Surviving ERISA Preemption: Pension Arbitration in the 1980's, 16 Columbia Journal of Law and Soc. Prob. 193, 284-85 (1980).

Similar agreements to arbitrate have been held unenforceable under the antitrust laws, see American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), and Title VII of the Civil Rights Act of 1964, see Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Accordingly, the Court holds that statutory claims brought to enforce the fiduciary responsibility provisions of ERISA are not subject to arbitration.

Finally, because the section 10(b) claims are subject to arbitration and the ERISA claims are not, the Court must determine whether to stay the federal proceedings pending arbitration.

In the interest of a speedy resolution to this controversy, and because the section 10(b) and the ERISA claims are not clearly identical and neither have any necessary temporal priority over the other, the Court concludes that the arbitration and the lawsuit should each proceed in its normal course. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); Dimenstien v. Whiteman, 759 F.2d 1514, 1517 (11th Cir. 1985); Steinberg, 735 F.Supp. at 620.

Accordingly, for the reasons already stated, defendants' motion to compel the section 10(b) claims is granted.

Defendants' motion to compel the ERISA claims is denied. The Motion to Stay Action Pending Arbitration is also denied.

Finally, based upon a consideration of the full record of this case, plaintiffs' oral application for costs pursuant to Federal Rules of Civil Procedure 11 is denied.

It is so ordered.

We are adjourned.

*COURT REPORTER'S TRANSCRIPT CERTIFICATE*

I hereby certify that the within and foregoing is a true and accurate transcript taken from the proceedings held on April 4, 1988, in the United States District Court, for the District of Connecticut, at New Haven, before the Hon. Jose A. Cabranes, U.S.D.J.

/s/Paul Collard

Official Court Reporter.

DATED: June 7, 1988.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| FRANK L. BIRD, TRUSTEE, ET AL | : | |
| Plaintiffs, | : | |
| vs. | : | CIVIL NO. |
| SHEARSON LEHMAN BROTHERS, INC. ET AL | : | H-87 530 (JAC) |
| Defendants. | : | |

AUGUST 17, 1987

**MOTION TO COMPEL ARBITRATION AND TO STAY ACTION PENDING ARBITRATION**

Pursuant to the Federal Arbitration Acts 9 U.S.C. §§ 1 *et seq.*, defendants Shearsons Lehman Brothers, Inc. ("Shearson") and Raymond R. Clements respectfully move this Court to compel arbitration of all claims in the above-captioned action, and to stay this action pending said arbitration.

In support of the foregoing, defendants represent that:

1. This action arises out of a dispute regarding the broker-customer relationship between the plaintiffs and defendants and securities transactions in the plaintiffs' account with Shearson.

ORAL ARGUMENT IS *NOT* REQUESTED

GRANTED IN PART and DENIED IN PART, in accordance with the court's oral ruling today in open court and on the record. It is so ordered.

/s/Jose A. Cabranes
Jose A. Cabranes, U.S.D.J.

New Haven, CT
April 4, 1988

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and eighty-nine.

Present:

Hon. Irving R. Kaufman
Hon. William H. Timbers
Hon. Richard J. Cardamone
Circuit Judges.

---

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

Plaintiffs-Appellees,

-v.-

SHEARSON LEHMAN/AMERICAN EXPRESS, INC., and RAYMOND R. CLEMENTS,

Defendants-Appellants.

---

88-7704

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH,
Clerk

s/Edward J. Guardaro
By: EDWARD J. GUARDARO,
Deputy Clerk

(2)

89-231

Supreme Court, U.S.
FILED
SEP 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1989

**SHEARSON LEHMAN/AMERICAN EXPRESS, INC. and RAYMOND R. CLEMENTS,**
*Petitioners,*

v.

**FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,**
*Respondents.*

## BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONALD R. HOLTMAN
*Counsel of Record*
*for Respondents*
KATZ & SELIGMAN
130 Washington Street
Hartford, CT 06106
(203) 547-1857

16P

## QUESTION PRESENTED

Whether participants in a qualified Employee Retirement Income Security Act of 1974 (ERISA) plan may be compelled to arbitrate claims of statutory violations asserted against a plan fiduciary, where a provision in an agreement between the employer and a plan fiduciary calls for compulsory arbitration of all claims.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 2

I. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE ISSUES SURROUNDING THE CONTROVERSY AT ISSUE IN THE CASE BELOW HAVE NOT BEEN FULLY DEVELOPED AT THIS TIME. THUS, CONSIDERATION OF THESE ISSUES WOULD BE AN IMPRUDENT UTILIZATION OF THE COURT'S VALUABLE RESOURCES ..... 3

II. PETITIONERS' ARGUMENT THAT GRANTING OF CERTIORARI IN THIS CASE WILL ENABLE THE COURT TO SETTLE ISSUES CONCERNING COMPULSORY ARBITRATION OF CLAIMS UNDER OTHER STATUTORY PROVISIONS AMOUNTS TO A REQUEST FOR AN ADVISORY OPINION IN VIOLATION OF ESTABLISHED RULES ..... 6

III. PETITIONERS ARGUE THAT ALLOWING PLAINTIFFS TO MAINTAIN SEPARATE ACTIONS IN BOTH ARBITRATION AND THE COURTS BELOW WOULD AMOUNT TO AN IMPROPER WASTE OF JUDICIAL RESOURCES ..... 10

CONCLUSION ..... 11

## TABLE OF AUTHORITIES


| Cases: | Page(s) |
|---|---|
| *Aetna Life Insurance v. Haworth*, 300 U.S. 227 (1937) | 7 |
| *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) | 7 |
| *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) | 7, 10 |
| *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 | 7 |
| *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3rd Cir. 1985) | 7 |
| *Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292 (2d Cir. 1989) | *passim* |
| *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) | 10 |
| *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) | 7 |
| *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) | 5 |
| *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989) | *passim* |
| *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 | 5 |
| *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) | *passim* |
| *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) | *passim* |
| *U.S. v. Fruehauf*, 365 U.S. 146 (1961) | 7 |
| *Wilko v. Swan*, 346 U.S. 427 (1953) | *passim* |

## TABLE OF AUTHORITIES (continued)

**Statutes and Regulations:** **Page(s)**

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) . . . . . *passim*

29 U.S.C. § 1110 (a) . . . . . 4

29 U.S.C. § 1144 . . . . . 5

54 Fed. Reg. 21,114 . . . . . 9

**Books and Articles:**

Shepherd, "Investor Protection and the Arbitrability of Securities Disputes After *Shearson/American Express, Inc. v. McMahon:* Legislative and Judicial Reaction," 25 Willamette L. Rev. 599 (Summer 1989) . . . . . 9

Wright, *Law of Federal Courts,* Fourth Edition, West Publishing . . . . . 7

## STATEMENT OF THE CASE

The plaintiffs accept the defendants' statement of the facts, except to the extent that it implies that plaintiff Joan Shea had contractually agreed with the defendants to an arbitral forum for the resolution of her ERISA or any other claims, and that plaintiff Frank L. Bird had agreed to arbitrate all of the disputes between the parties. The plaintiffs state that Joan Shea was not a signatory or party to the agreement, but merely an employee participant in the plan, and that plaintiff Frank L. Bird as Trustee signed a standard form customer agreement which contained the arbitration language quoted by the petitioners.

## REASONS FOR DENYING THE WRIT

The Court should deny the writ in this case because the issues in this case have not been sufficiently developed at this time. Petitioners in their brief cite only two appellate level cases related to the issues currently before this Court. Given this short and premature history it would be unwise for the Court to consider the merits of this controversy at this time. The premature nature of this petition is further illustrated by the lack of any substantial published legal scholarship addressing the specific issues giving rise to the Petitioners' request.

While the petitioners cite the recent decisions of this Court in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) as evidence of a fully-developed controversy concerning compulsory arbitration of claims based on violations of securities laws, it is respectfully submitted that these cases do not directly bear on the issues before the courts below in this matter. While it is true that the controversy surrounding compulsory arbitration of claims based on violations of the Securities Acts of 1933 and 1934 had been well developed by the time the Court decided the *McMahon* and *Rodriguez* cases, it is not true that the controversy surrounding compulsory arbitration of claims based on violations of ERISA has been fully developed.

The importance of allowing full development of issues through a case-by-case approach is at the very heart of the American legal system. This traditional approach to legal reasoning is well illustrated by the long line of cases interpreting the Federal Arbitration Act, and its application to various circumstances. Beginning with *Wilko v. Swan*, 346 U.S. 427 (1953) the Court has consistently found that Congress has the authority to explicitly or implicitly override the Federal Arbitration Act. Consistently, this Court and the lower courts following this Court's decisions have held that one could not be compelled to arbitrate claims where statutory language specifically prohibited such compulsion, where

the legislative history of an act prohibited such compulsion, or where the fundamental goals and purposes of an act were inconsistent with compulsory arbitration.

In reviewing the decision of the United States District Court for the District of Connecticut in the case below the United States Court of Appeals for the Second Circuit applied the appropriate legal standard. The court found that the legislative history and specific provisions of ERISA indicated a Congressional intent to exempt certain ERISA-based claims from compulsory arbitration. Additionally, the court below found the goals and objectives of ERISA inconsistent with Petitioners' request to compel arbitration of all ERISA-based claims through a blanket, pre-dispute, standardized arbitration clause in a contract of adhesion. The court found that ERISA's goal of protection of employee rights and development of a uniform Federal common law of employee benefits were thus inconsistent with compulsory arbitration provisions of agreements such as the one at issue in the case below. Similarly, Judge Gibson's dissent in *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), also points to the incompatibility of the fiduciary responsibilities under ERISA and compulsory arbitration clauses in contracts of adhesion.

## I. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE ISSUES SURROUNDING THE CONTROVERSY AT ISSUE IN THE CASE BELOW HAVE NOT BEEN FULLY DEVELOPED AT THIS TIME. THUS, CONSIDERATION OF THESE ISSUES WOULD BE AN IMPRUDENT UTILIZATION OF THE COURT'S VALUABLE RESOURCES.

At the present time very few courts have considered the issue of compulsory arbitration of ERISA-based claims of statutory violations. Petitioners in their brief requesting certiorari cite only two appellate court cases dealing directly with the issues presented in the case below, *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), and *Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292 (2d Cir. 1989). While these two cases are important cases and

worthy of public debate and discussion, they do not represent a significant conflict between United States Circuit Courts of Appeal.

The Respondents respectfully submit that *Sulit* and *Bird* do not represent a significant conflict due to the differences in both the factual circumstances of the cases, and the legal theories argued in the cases. In *Sulit* the court was faced with a set of facts where only plan fiduciaries and signatories to the arbitration agreement were parties to the litigation. In contrast to *Sulit, Bird* is a case in which all parties are not signatories to the agreement between the plan's sponsoring employer, and the plan fiduciary. Furthermore, *Sulit* was argued on the basis of 29 U.S.C. § 1110(a), the waiver provisions of ERISA, which are very similar to the waiver provisions found in the Securities Act of 1933, and the Securities Exchange Act of 1934; *Bird* by contrast was not argued on the basis of the waiver provision alone, but was argued based on the legislative history, general text of the statute and the fundamental purposes of the act.

In *Sulit* the United States Court of Appeals for the Eighth Circuit reviewed an opinion of the District Court which was based strictly on the argument that 29 U.S.C. § 1110(a) bars enforcement of agreements to require arbitration. *Sulit,* 847 F.2d 475, 477. The Eighth Circuit's opinion in *Sulit* also specifically recognized that the Plaintiff below, Sulit, had not argued, nor had he relied upon, ERISA's legislative history to support his claim of preemption of the Federal Arbitration Act by ERISA. *Sulit,* 847 F.2d 475, 478 (8th Cir. 1988). The United States Court of Appeals for the Second Circuit specifically recognized the limited nature of the *Sulit* opinion in footnote eight of its opinion, and further held that, based on its analysis of the entire text of ERISA, the legislative history supporting ERISA legislation, and the fundamental purposes of the act, Congress had intended to preclude enforcement of agreements to require arbitration of the fiduciary responsibility requirements of ERISA. *Bird v. Shearson Lehman/American Express, Inc.,* 817 F.2d 292 (2d Cir. 1989).

Balancing the interests of all of the parties to a controversy is something which United States courts are uniquely qualified to do, and something which they are specifically charged with the responsibility for in our system of government. In the two cases which Petitioners cite as conflicting, the courts below were simply faced with a different mix of parties, facts, and legal theories; hence, it is not surprising that different factors were given different weights and a subtle balance between the interests was struck. Respondents submit that this balancing process works best on a case-by-case basis, in which all interested parties are fully represented and all legal arguments are fully developed. In this process a logical set of rules will evolve from the balancing of these interests and a fully-developed record of case law will be developed to assist the decision-making process.

The development of this case-by-case approach to the development of legal rules is at the heart of traditional common law legal systems, and represents precisely what Congress intended in ERISA, 29 U.S.C. § 1144, when Congress established that a fundamental purpose of ERISA was to develop a "Federal Common Law" of employee benefits. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983). Currently, only a small fraction of all factual patterns have been considered and argued. Thus, a decision to grant certiorari in this matter, coupled with the type of broad sweeping decision on the merits sought by the Petitioners in the Question Presented would prematurely arrest the development of the law in this area.

Contrary to the Petitioners' assertions, the conflict between the circuits is not fully developed, and courts do not, as the Petitioners argue, either apply the Court's rationale in *McMahon* and *Rodriguez* to ERISA claims, or refuse to apply the Court's rulings in *McMahon* and *Rodriguez* to ERISA claims. The Second Circuit's opinion in *Bird* clearly recognizes and applies the proper legal standard set forth in *McMahon*. *Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292. In applying that standard the court found

that Congress had intended to preempt the Federal Arbitration Act and that the fundamental purposes of ERISA were inconsistent with compulsory arbitration of statutory claims based on violations of ERISA fiduciary responsibility provisions.

While it is true that in the *Bird* case below the Second Circuit reached a conclusion that results in a different outcome from the outcome of the *Sulit* case argued before the Eighth Circuit, it is also true that the Second Circuit in *Bird* applied the correct legal standard to a different factual situation that had produced different legal arguments. Thus, the Second Circuit had a record before it that more clearly linked the labor and employment law history of ERISA to the facts before the court. Based on this record the Second Circuit correctly analyzed the legislative text, legislative history, and the objectives of ERISA in the light of the Court's recent rulings concerning compulsory arbitration.

## II. PETITIONERS' ARGUMENT THAT GRANTING OF CERTIORARI IN THIS CASE WILL ENABLE THE COURT TO SETTLE ISSUES CONCERNING COMPULSORY ARBITRATION OF CLAIMS UNDER OTHER STATUTORY PROVISIONS AMOUNTS TO A REQUEST FOR AN ADVISORY OPINION IN VIOLATION OF ESTABLISHED RULES.

The distinctions discussed above emphasize the importance of having a complete record. A court is not a legislative body, and thus courts should not provide advisory opinions or opinions based on a record that is incomplete. The Petitioners argue that if the Court takes this case it will have the opportunity to guide the lower courts in their handling of other statutes as these statutes relate to the Federal Arbitration Act. Respondents respectfully submit that this Court should not engage in this type of speculative advisory process. Courts are uniquely established to resolve fully-developed conflicts between adversary parties based on a full and complete record; courts are not legislative bodies with wholesale law-making authority.

Clearly, the case before the Court does not present an adequate record to allow the Court to address the sweeping question of compulsory arbitration of all types of statutory ERISA claims in all contexts as requested by the Petitioners. Therefore, Respondents respectfully submit that this request amounts to a request for an advisory opinion in violation of justiciability requirements for Article III courts. Wright has written that: "Yet the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions . . ." Wright, *Law of Federal Courts;* See also *U.S. v. Fruehauf,* 365 U.S. 146 (1961), *Aetna Life Insurance v. Haworth,* 300 U.S. 227 (1937).

Consistently, this Court has held that the enforcement of agreements to arbitrate disputes arising under federal statutory provisions is to be determined by discerning Congress' intent to override the Federal Arbitration Act as evidenced in the text of the statute giving rise to the action, the legislative history of the statute, or from the statute's underlying purposes. *Rodriguez De Quijas v. Shearson/American Express, Inc.,* 109 S.Ct. 1917 (1989), *Shearson/American Express v. McMahon,* 482 U.S. 220 (1987). Thus, the underlying principle of *Rodriguez* and *McMahon* is consistent with the guidelines developed in *Wilko,* and the long history in case-by-case, statute-by-statute determination of which statutory claims are exempt from enforcement of arbitration agreements. Illustrations of this Court's rulings on such matters are found in *McDonald v. City of West Branch, Michigan,* 466 U.S. 284 (1984), and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). In each of these cases this Court, applying the same legal principles outlined in *Rodriguez* and *McMahon,* found that Congress had in fact intended to override the applicability of the Federal Arbitration Act. Similarly, the Courts of Appeal have woven threads into this continuous fabric of case law. *Barrowclough v. Kidder, Peabody & Co., Inc.,* 752 F.2d 923 (3rd Cir. 1985), *Amaro v. Continental Can Company,* 724 F.2d 747 (9th Cir. 1984), *American Safety Equipment Corp. v. J.P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968).

In order to support their request for a broad-ranging review of the enforcement of arbitration agreements under any provision of ERISA the Petitioners note that some 6,704 claims based on some aspect of ERISA were filed in Federal District Courts during the reporting year ending in June of 1988. The filing of these suits illustrates that Congress's intention in ERISA to establish a "Federal Common Law" of employee benefits is being followed by the courts, employee benefit plan fiduciaries, and plan participants. Hence, establishing a rule that participants and employees who are the victims of ERISA statutory violations may be compelled to arbitrate claims based on statutory violations will preclude federal courts from developing a "Federal Common Law" of employee benefits. Thus, Respondents respectfully submit that 6,704 suits filed in Federal District Courts simply illustrate that the system is working precisely as Congress intended.

Respondents do not dispute that 6,704 ERISA claims were filed. However, Respondents do respectfully argue that only some unknown fraction of these claims are directly relevant to the issues developed in the record below. Petitioners' implied claim that a decision in this case will significantly impact caseloads is not supported by any credible data that breaks out the distribution of filings by type of action. While it appears to be true that in the post-*McMahon* era almost 100 percent of all brokerage contracts require compulsory arbitration clauses, it is not clear that non-brokerage house-managed employee benefit or employee welfare plans have similar provisions. Thus, given that brokerage firms handle only a small portion of some types of ERISA plans, only a very small portion of the 6,704 filings may prove to be directly related to the issues raised in this case.

Furthermore, the Court may find it imprudent to intervene in the regulation of brokerage contracts at this time. Recently, several states have established regulations that prohibit compulsory arbitration clauses of the type at issue in

this case.[1] Additionally, legislation has been introduced in Congress to modify securities arbitration, and to control the power of brokerage firms to compel compulsory arbitration clauses in contracts of adhesion with their clients.[2] The Securities Industry Association has also recently established new guidelines concerning compulsory arbitration provisions, and it has also published a new model customer agreement which incorporates numerous changes to the standard arbitration clause at issue before the courts below.[3] Lastly, the Securities and Exchange Commission, the New York Stock Exchange, the National Association of Securities Dealers, the Securities Industry Conference on Arbitration, and the North American Securities Administrators Association have worked to establish significant changes to the regulations concerning compulsory pre-dispute arbitration agreements of the type before the courts below.[4] Therefore, Respondents respectfully submit that regulatory changes have essentially mooted the securities regulatory policy issues raised before the courts below in this case. Hence, Respondents submit that the Court should not grant certiorari in this case as it addresses issues that have been resolved by other branches of government, and thus it does not raise issues which merit attention by this Court.

---

[1] Massachusetts, California, and New Mexico have established regulations that prohibit such regulations. See: *Shepherd*, "Investor Protection and the Arbitrability of Securities Disputes After *Shearson/American Express, Inc. v. McMahon:* Legislative and Judicial Reaction," 25 Willamette L. Rev. 599.

[2] *Id.* at 619–627.

[3] *Securities Week*, McGraw-Hill, July 17, 1989.

[4] 54 Fed. Reg. 21,144 (May 16, 1989). See also: *[Current Developments]* Fed. Sec. L. Rep. (CCH) 80,099.

## III. PETITIONERS ARGUE THAT ALLOWING PLAINTIFFS TO MAINTAIN SEPARATE ACTIONS IN BOTH ARBITRATION AND THE COURTS BELOW WOULD AMOUNT TO AN IMPROPER WASTE OF JUDICIAL RESOURCES.

Respondents concede that prosecuting both the securities claims in arbitration and the ERISA claims in federal court will entail some duplication. However, mere duplication is not adequate grounds for denying the Plaintiff access to federal courts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). This general rule has been followed by numerous lower federal courts in dealing with similar issues such as exhaustion of internal plan remedies in the context of employee benefit plans under ERISA. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). Consistently the courts have held that mere duplication alone is inadequate to bar the Plaintiff from her right to pursue her remedies in federal court.

## CONCLUSION

Respondents submit that Petitioners' petition for a writ of certiorari should be denied because: (1) The apparent conflict between the circuits is not a significant conflict, (2) The broadly stated question presented by Petitioners requests an advisory opinion because it raises issues not argued before the trial court, or the United States Court of Appeals for the Second Circuit, (3) The public policy issues in this case have become moot due to the Securities and Exchange Commission's revised regulations which substantially change arbitration clauses allowed in brokerage contracts, and (4) There is no conflict alleged or reported between or among any group of the Circuit Courts of Appeal regarding the ruling below allowing Respondents, Plaintiffs below, to proceed simultaneously with both the ERISA claims in federal court and the securities claims in arbitration. For all of the foregoing reasons, Respondents respectfully request the Court to deny the Petitioners' request for a writ of certiorari.

DATED: Hartford, Connecticut
September 6, 1989

DONALD R. HOLTMAN
*Counsel of Record*
*for Respondents*
KATZ & SELIGMAN
130 Washington Street
Hartford, CT 06106
(203) 547-1857

No. 89-231

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

Supreme Court, U.S.
FILED
OCT 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and
RAYMOND R. CLEMENTS,

*Petitioners,*

v.

FRANK L. BIRD, Trustee of the FRANK L. BIRD
PROFIT SHARING TRUST, FRANK L. BIRD, Individually,
and JOAN SHEA,

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THEODORE A. KREBSBACH
*Counsel of Record for Petitioners*

Office of the General Counsel
Shearson Lehman Hutton Inc.
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
*Of Counsel*

TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | ii |
| Argument | 1 |
| I. The Fully Developed Conflict Among the Circuit Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate ERISA Disputes Warrants Immediate Resolution by the Court. | 1 |
| II. Petitioners Have Not Sought an Advisory Opinion by Apprising the Court That This Case Presents It with the Opportunity to Clarify the Distinctions Between Its Commercial and Labor Arbitration Precedents. | 7 |
| Conclusion | 9 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) | 7 |
| *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) | 7 |
| *Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) | 2, 3, 7 |
| *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989) | *passim* |
| *Cohen v. Cowen Securities, Inc.*, No. 89-8090-CIV-PAINE (S.D. Fla. July 24, 1989) | 2 |
| *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985) | 4, 5 |
| *Gorinsky v. Bear, Stearns & Co.*, No. 89 Civ. 1224 (MBM) (S.D.N.Y. May 2, 1989) (Lexis, Fedsec library, Courts file) | 2 |
| *Iacono v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989) | 2 |
| *McDonald v. City of West Branch*, 466 U.S. 284 (1984) | 7 |
| *Mistretta v. United States*, 109 S. Ct. 647 (1989) | 7 |
| *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) | 3, 4, 6 |
| *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) | 4, 5 |
| *Perry v. Thomas*, 482 U.S. 483 (1987) | 5 |
| *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) | 6 |

Page

*Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) ..... 3, 4, 5, 6

*Rosenblum v. Drexel Burnham Lambert*, 700 F. Supp. 874 (E.D. La. 1987) ..... 2

*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) ..... 3, 6

*Securities Industry Association v. Connolly*, ____ F.2d ____, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,561 (1st Cir. Aug. 31, 1989) ..... 8

*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... 3, 4, 5, 6

*Southland Corp. v. Keating*, 465 U.S. 1 (1984) ... 6

*Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) ..... 2

*United States v. Fruehauf*, 365 U.S. 146, *reh'g denied*, 365 U.S. 875 (1961) ..... 7

*Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989) ..... 3

*Wilko v. Swan*, 346 U.S. 427 (1953) ..... 4

**Statutes and Rules**

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ..... 1

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982) 5

Page

Rules of the Supreme Court of the United States.

Rule 17.1(a) . . . . . 2

Rule 17.1(c) . . . . . 4

**Legislative Materials**

H.R. Rep. No. 4960, 100th Cong., 2d Sess. (1988) 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-231

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and RAYMOND R. CLEMENTS,

*Petitioners,*

v.

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

*Respondents.*

## REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

### ARGUMENT

**I. The Fully Developed Conflict Among the Circuit Courts of Appeals Regarding the Enforceability of Agreements to Arbitrate ERISA Disputes Warrants Immediate Resolution by the Court.**

Petitioners have requested that the Court resolve the fully developed conflict among the circuit courts of appeals regarding the enforceability of agreements to arbitrate disputes under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1982) ("ERISA"). *See* Petition for a Writ of Certiorari ("Petition") at 5-15. The conflict among the circuits

is represented in *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989), *Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), and *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988). The conflict is mirrored by a conflict among the district courts. *See Rosenblum v. Drexel Burnham Lambert*, 700 F. Supp. 874 (E.D. La. 1987) (agreements to arbitrate ERISA claims enforceable); *see also Iacono v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989); *Cohen v. Cowen Securities, Inc.*, No. 89-8090-CIV-PAINE (S.D. Fla. July 24, 1989); *but see Gorinsky v. Bear, Stearns & Co.*, No. 89 Civ. 1224 (MBM) (S.D.N.Y. May 2, 1989) (Lexis, Fedsec library, Courts file).

Respondents, in their Brief in Opposition, conclude that a fully developed conflict regarding this issue does not exist since petitioners have cited "only two appellate level cases related to the issues currently before this Court" and "[g]iven this short and premature history it would be unwise for the Court to consider the merits of this controversy at this time." Brief in Opposition ("Opp.") at 2.[1] In addition to incorrectly stating that only two federal courts of appeals, rather than three, have decided the issue presented to the Court, respondents have failed to recognize that a conflict warranting review by the Court exists when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." *See* Rules of the Supreme Court of the United States ("Supreme Court Rules"), Rule 17.1(a).

There is thus no requirement for more than two courts of appeals to render conflicting opinions on the same issue for the Court to consider granting certiorari to resolve the conflict. The

---

[1] Respondents also contest petitioners' recitation of the underlying facts of this case to the extent it "implies" that certain respondents executed the arbitration agreement binding the parties. Opp. at 1. This assertion is not relevant to the issue presented to the Court since the court of appeals ruled that respondent Frank L. Bird, who executed the arbitration agreement in his capacity as trustee, bound all participants and beneficiaries to the agreement, including non-signatories. *See Bird*, 871 F.2d at 294. Respondents have not filed a cross-petition on this issue and it is not before the Court.

Court has even granted certiorari to review circuit court opinions that refused to enforce valid arbitration agreements that did not conflict with the opinion of any other court. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

The conflict among the federal courts of appeals is fully developed. The federal courts of appeals either apply the Court's directives in *Mitsubishi* and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) to ERISA and enforce valid agreements of parties to arbitrate their ERISA disputes or they refuse to enforce such agreements without relying on any cognizable evidence of congressional intent to prohibit arbitration of ERISA. *See* Petition at 8-15.

The Second Circuit in *Bird* refused to enforce the agreement of the parties in the present case to arbitrate their ERISA dispute. The Petition asserts that the Second Circuit's opinion is premised on a judicial hostility to arbitration that the Court has categorically rejected in *Mitsubishi, McMahon* and *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). The Second Circuit in *Bird* explicitly disagreed with the Eighth Circuit's opinion in *Sulit* which adopted the rationale underlying *McMahon* and *Mitsubishi*:

> [To] the extent the *Sulit* court could "find no hint in [ERISA's] legislative history" of Congress's intent that substantive ERISA claims not be subject to compulsory arbitration, we disagree.

*Bird*, 871 F.2d at 298 n.8. The Second Circuit instead relied on (i) the Third Circuit's opinion in *Barrowclough* which predated *Mitsubishi, McMahon* and *Rodriguez* and (ii) aspects of ERISA that the Court has rejected as evidencing congressional intent to prohibit arbitration of any statute. *Id.* at 297. The result is a clear and direct conflict among the circuits regarding the enforceablility of agreements to arbitrate ERISA disputes.

Respondents also argue that a fully developed conflict among the federal courts of appeals does not exist since the Second and Eighth Circuits were presented with different factual settings and legal arguments. Opp. at 4. This argument of respondents is also misplaced. The Second, Third and Eighth Circuits all resolved the identical legal issue; namely, whether Congress intended to prohibit arbitration of ERISA disputes. The facts underlying these cases, moreover, had no impact on the legal issue confronting the circuits and have no relevance to the legal issue presented to the Court.

Respondents have also failed to recognize that review by the Court of the Second Circuit's opinion is also warranted since the Second Circuit "has decided a federal question in a way in conflict with applicable decisions of this Court." *See* Supreme Court Rules, Rule 17.1(c). The Court in *Mitsubishi*, *McMahon* and *Rodriguez* removed any doubt as to the enforceability of an agreement to arbitrate a statutory claim unless Congress expressed an intention to preclude arbitration of the particular statutory claim at issue. *See McMahon*, 482 U.S. at 226-27. The Court in *Rodriguez* overruled *Wilko v. Swan*, 346 U.S. 427 (1953), in an attempt to eliminate "the old judicial hostility to arbitration." *Rodriguez*, 109 S. Ct. at 1920. The Second Circuit's opinion conflicts with the Court's modern arbitration jurisprudence since it did not rely on any cognizable evidence of congressional intent to prohibit arbitration of ERISA disputes, continuing to foster a hostility to and mistrust of arbitration. This was recognized by the dissenting opinion in *Bird*:

> In the final analysis, what remains of my colleagues' underlying premise must be that Congress would not have envisioned arbitration of ERISA's remedial statutory rights because arbitrators are not up to the task. Yet, that assumption appears untenable....*See McMahon*, 107 S. Ct. at 2340; *Mitsubishi*, 473 U.S. at 633...; [*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)]....

*Bird*, 871 F.2d at 300 (Cardamone, J., dissenting).

The Second Circuit's opinion further conflicts with decisions of the Court by finding congressional intent to prohibit arbitration of ERISA disputes in aspects of ERISA that the Court has examined in construing the arbitrability of other statutes and rejected as evidencing such congressional intent. *See* Petition at 10-11 & n.5. The dissenting opinion in *Bird* recognized the conflict between the majority's finding of congressional intent and decisions of the Court:

> [The court's] finding of Congressional design is unsupported by [its] citations to ERISA's text or its legislative history – neither source even mentions arbitration. Further, it defies the Supreme Court's pronouncement that our "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on *statutory* rights."

*Bird*, 871 F.2d at 299 (Cardamone, J., dissenting) (citing *McMahon*) (emphasis in original). The Second Circuit's opinion is clearly in conflict with decisions of the Court and is reviewable under Rule 17.1(c).

Finally, respondents have failed to recognize that review by the Court is further warranted since the Second Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court...." *See* Supreme Court Rules, Rule 17.1(c). The Court has developed significant jurisprudence under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982), in furtherance of the strong federal policy in favor of arbitration, requiring the rigorous enforcement of arbitration agreements. *See McMahon*, 482 U.S. at 226 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The issue presented in the Petition is as important as any of the arbitration issues the Court has reviewed in recent years. *See, e.g., Rodriguez* (arbitrability of claims asserted under § 12(2) of the Securities Act of 1933); *Volt* (validity of state statute allowing a court to stay arbitration pending resolution of related litigation); *McMahon* (arbitrability of § 10(b) of the Securities Exchange Act of 1934 and RICO); *Perry v. Thomas*, 482 U.S. 483

(1987) (enforceability of state law prohibiting agreements to arbitrate wage claims); *Mitsubishi* (arbitrability of federal antitrust laws); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (enforceability of state law prohibiting agreements to arbitrate franchise disputes); *Moses H. Cone* (propriety of staying a federal action in deference to a parallel state court action); *Scherk* (arbitrability of § 10(b) claims in international context); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (whether a federal court or an arbitrator is to resolve a claim of "fraud in the inducement" of a contract). Should the Court grant certiorari and decide the issues presented in the Petition, it can once and for all remove any further hostility to arbitration by mandating that the lower courts, including the Second Circuit, follow its directives in *Mitsubishi*, *McMahon* and *Rodriguez*.

A failure to review the Second Circuit's opinion, moreover, would conflict with the desire of Congress, which, through its enactment of the Federal Arbitration Act, allowed parties to an arbitration agreement to resolve their dispute in an expeditious manner outside of a judicial forum. This is one of the reasons the Court granted certiorari in *Keating* to review a decision that refused to enforce an arbitration agreement. *See Keating*, 465 U.S. at 7.

Respondents have failed to recognize the significance of the fully developed conflict among the federal courts of appeals and these other aspects of the Second Circuit's opinion that warrant immediate review by the Court.

## II. Petitioners Have Not Sought an Advisory Opinion by Apprising the Court That This Case Presents It with the Opportunity to Clarify the Distinctions Between Its Commercial and Labor Arbitration Precedents.

The Second and Third Circuits' refusal to enforce agreements to arbitrate ERISA disputes was partially based on the Court's labor arbitration jurisprudence represented in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). *See Bird*, 871 F.2d at 297-98; *Barrowclough*, 752 F.2d at 940. The Court's labor arbitration jurisprudence is distinguishable from its commercial arbitration jurisprudence under the Federal Arbitration Act and should not have been relied on by the Second and Third Circuits. *See* Petition at 10-13. Other federal courts of appeals have also inappropriately relied on the Court's labor arbitration cases to support their refusal to enforce valid agreements of parties to arbitrate various statutory disputes. *Id.* at 16-17 & nn.8-9. Since the Second Circuit expressly relied on the Court's labor arbitration cases in refusing to enforce the parties' arbitration agreement, the Court, should it grant certiorari, will examine the applicability of these cases to the issue presented in the Petition. Petitioners have apprised the Court that should it decide to review the Second Circuit's opinion in the present case, it will have the opportunity, should it so choose, to clarify the distinctions between its commercial and labor arbitration precedents which will guide the lower courts in future cases.

Respondents have argued that this aspect of the Petition requests "an advisory opinion in violation of justiciability requirements for Article III courts." *See* Opp. at 7. Article III of the Constitution limits the judicial power of the United States Courts to "cases" and "controversies" and courts cannot issue advisory opinions which resolve issues that are not before them. *See Mistretta v. United States*, 109 S. Ct. 647 (1989); *United States v. Fruehauf*, 365 U.S. 146, 157, *reh'g denied*, 365 U.S. 875 (1961). Petitioners have not sought an advisory opinion since the applicability of the Court's labor arbitration cases to commercial

arbitration under the Federal Arbitration Act is an issue directly involved in this case. Petitioners have not asked the Court to speculate on an issue not before it, but have merely apprised the Court of the effect its resolution of this issue will have on the lower courts.[2]

[2] Respondents have also argued that the Court should not grant certiorari since Congress and various states have introduced legislation to regulate securities arbitration. Opp. at 9. The Bill respondents have referred to, H.R. Rep. No. 4960, 100th Cong., 2d Sess. (1988), was not passed by Congress and there is no similar legislation presently pending before Congress. Moreover, the state regulation respondents have relied on has recently been held to be unconstitutional. *See Securities Industry Association v. Connolly*, ____ F.2d ____, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,561 (1st Cir. Aug. 31, 1989).

## CONCLUSION

Based on the foregoing reasons, as well as those contained in the Petition for a Writ of Certiorari, the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it refused to enforce the contractual agreement of the parties to arbitrate their ERISA dispute.

DATED: New York, New York
October 2, 1989

THEODORE A. KREBSBACH
*Counsel of Record for Petitioners*

Shearson Lehman Hutton Inc.
Office of the General Counsel
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
*Of Counsel*

(3)

No. 89-231

Supreme Court, U.S.
FILED
SEP 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and RAYMOND R. CLEMENTS, *Petitioners*,

—v.—

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

JAMES K. MANNING
Counsel of record; and
PAUL WINDELS III
ELIZABETH STORCH
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300
Attorneys for Securities Industry Association, The Advest Group, Inc., J.C. Bradford & Co., Dain Bosworth Incorporated, D.A. Davidson & Co., Inc., Dean Witter Reynolds Inc., A.G. Edwards & Sons, Inc., Goldman, Sachs & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Prudential-Bache Securities Inc., and Wheat, First Securities, Inc., as *Amici Curiae*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-231**

---

SHEARSON LEHMAN/AMERICAN EXPRESS INC. and RAYMOND R. CLEMENTS,

*Petitioners,*

—v.—

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## MOTION OF THE SECURITIES INDUSTRY ASSOCIATION, THE ADVEST GROUP, INC., J.C. BRADFORD & CO., DAIN BOSWORTH INCORPORATED, D.A. DAVIDSON & CO., INC., DEAN WITTER REYNOLDS INC., A.G. EDWARDS & SONS, INC., GOLDMAN, SACHS & CO., J.J.B. HILLIARD, W.L. LYONS, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, PIPER, JAFFRAY & HOPWOOD INCORPORATED, PRESCOTT, BALL & TURBEN, INC., PRUDENTIAL-BACHE SECURITIES INC., AND WHEAT, FIRST SECURITIES, INC., FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

---

The Securities Industry Association ("SIA"), The Advest Group, Inc. ("Advest"), J.C. Bradford & Co. ("Bradford"), Dain Bosworth Incorporated ("Dain Bosworth"), D.A. Davidson & Co., Inc. ("Davidson"), Dean Witter Reynolds Inc. ("Dean Witter"), A.G. Edwards & Sons, Inc. ("A.G. Edwards"), Goldman, Sachs & Co. ("Goldman Sachs"), J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), Piper, Jaffray & Hopwood Incorporated ("Piper Jaffray"), Prescott, Ball & Turben, Inc. ("Prescott"), Prudential-Bache Securities Inc. ("Prudential"), and Wheat, First Securities Inc. ("Wheat First"), hereby respectfully move, pursuant to Rule 42 of this Court, for leave to file the annexed brief, as *amici curiae* in support of the Petitioners, urging this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit with respect to its decision and judgment below in *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989). The consent of Shearson Lehman/American Express Inc. and Raymond R. Clements, the Petitioners, has been obtained. Consent of the Respondents has been requested but was not granted.

## INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than six hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici* Advest, Bradford, Dain Bosworth, Davidson, Dean Witter, A.G. Edwards, Goldman Sachs, Hilliard Lyons, Merrill Lynch, Piper Jaffray, Prescott, Prudential, and Wheat First.

*Amici curiae* have a substantial interest in having this Court resolve whether agreements to arbitrate claims arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2, as this Court has found with respect to claims arising under the antitrust laws, the racketeering laws, and the securities laws. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989). *Amici* seek to clarify and make uniform the law on this issue so that the enforceability of arbitration provisions in agreements with their customers can be predicted and relied upon.

This concern is not abstract: a significant portion of *amici's* accounts, such as Individual Retirement Accounts, are subject to ERISA. The decision below has the anomalous result of rendering the same agreement enforceable as to some accounts and unenforceable as to others. As a practical matter, it would carve a major exception to the rule this Court set down in *Rodriguez* and *McMahon*: that arbitration clauses in brokerage agreements are enforceable under the Arbitration Act.

SIA has also filed *amicus* briefs with this Court on the enforceability of agreements to arbitrate in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284, and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989).

*Amici curiae* firmly believe that the Court of Appeals erred below. The Court of Appeals, notwithstanding the congressional policy favoring arbitration contained in the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* voided an agreement to arbitrate future claims brought under ERISA as a waiver of substantive rights under that statute. It did so even though this Court has often held that such an agreement does not affect substantive rights under the antitrust laws, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the securities laws, *Rodriguez De Quijas* v. *Shearson/American*

*Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989) and *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987) and the federal racketeering statute, *McMahon*.

*Amici* move for leave to file this brief in order to put facts relating to arbitration practice in the securities industry before the Court. *See* proposed brief, *infra*, at 7-12. These facts, *amici* respectfully submit, will assist the Court in deciding whether to grant a writ of *certiorari*. They bear out this Court's approval of securities industry arbitration—and thus its conclusion that an agreement to arbitrate claims does not waive substantive rights. By the same token, they refute the Court of Appeals' negative assumptions about arbitration and thus undercut the basis of its decision.

WHEREFORE, the Securities Industry Association, The Advest Group, Inc., J.C. Bradford & Co., Dain Bosworth Incorporated, D.A. Davidson & Co., Inc., Dean Witter Reynolds Inc., A.G. Edwards & Sons, Inc., Goldman, Sachs & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Prudential-Bache Securities Inc., and Wheat, First Securities, Inc., respectfully move this Court that leave be granted them to file the brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Dated: September 6, 1989

Respectfully submitted,

/s/ James K. Manning

JAMES K. MANNING
Counsel of Record; and
PAUL WINDELS III
ELIZABETH STORCH
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for *Amici Curiae*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | ii |
| Brief of *Amici Curiae* | 1 |
| Preliminary Statement | 1 |
| Interest of *Amici Curiae* | 2 |
| Reasons for Granting a Writ of *Certiorari* | 3 |
| Summary of Argument | 4 |
| ARGUMENT | |
| I. The United States Arbitration Act Mandates that Arbitration be Recognized as an Efficient and Widely Accepted Means of Resolving Broker-Customer Disputes in the Securities Industry | 5 |
| II. The Court Below Misapplied the Standard for Finding an Implied Repeal of the United States Arbitration Act | 12 |
| III. The Circuits Stand in Conflict as to the Arbitrability of ERISA Claims | 15 |
| CONCLUSION | 16 |
| APPENDIX | |
| Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989) (Excerpted) | A1 |
| SUPPLEMENTAL LODGING OF *AMICI CURIAE* | |
| New York Stock Exchange, Inc., Arbitration Rules | 1 |

## TABLE OF AUTHORITIES

**Cases:** PAGE

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) .14, 15

*Allen v. McCurry*, 449 U.S. 90 (1980)..... 13

*Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).....4, 14, 16

*Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).....14, 15

*Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989) .....2, 4, 6, 7, 11, 14n

*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) 3

*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982)..... 13

*Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942)..... 5

*McDonald v. City of West Branch*, 466 U.S. 284 (1984) .....14, 15

*McMahon v. Shearson/American Express*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987) ..... 7, 15

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).....*passim*

*Morton v. Mancari*, 417 U.S. 535 (1974)..... 13

*Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) ..... 4, 5

*Rodriguez De Quijas v. Shearson/American Express, Inc.*, ____ U.S. ____, 109 S. Ct. 1917 (1989) .....2, 3, 4, 5, 6, 15, 16

*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) .... 6

PAGE

*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... 2, 3, 4, 5, 6, 7, 16

*Southland Corp. v. Keating*, 465 U.S. 1 (1984) ..... 4, 6

*Taggert Corp. v. Efros*, 475 F. Supp. 124 (S.D. Tex. 1979) ..... 6

**Statutes:**

Employee Retirement Income Security Act of 1974
Section 1001 *et seq.*, 29 U.S.C. § 1001 *et seq* ..... 2
Section 1144(d), 29 U.S.C. § 1144(d) ..... 13n

Labor-Management Relations Act of 1947
Section 301, 29 U.S.C. § 185 ..... 14

Racketeering Influenced and Corrupt Organization Act
Sections 18 U.S.C. §§ 1961-68 ..... 7

Securities Exchange Act of 1934
Section 78 *et seq.*, 15 U.S.C. § 78 *et seq* ..... 14
Section 19, 15 U.S.C. § 78s ..... 8
Section 27, 15 U.S.C. § 78aa ..... 14

United States Arbitration Act
Section 1 *et seq.*, 29 U.S.C. § 1 *et seq* ..... 3
Section 2, 9 U.S.C. § 2 ..... 2

**Rules:**

American Stock Exchange, Inc., Arbitration Rules, 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J ..... 7n, 8n, 10n, 11n

Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3746 ..... 7n, 8n, 10n, 11n

PAGE

Constitution of the New York Stock Exchange, Inc., Art. XI, 2 N.Y.S.E. Guide (CCH) ¶¶ 1501-1503 ..... 8n

New York Stock Exchange, Inc., Arbitration Rules 600-637 .....7n, 8n, 9n, 10n, 11n

Uniform Code of Arbitration §§ 1-31, *reprinted in* Sixth Report of the Securities Industry Conference on Arbitration (August 1989).....7n, 10n, 11n

**Articles:**

C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279 (1984) .....11, 11n

**Miscellaneous:**

American Stock Exchange, Inc., Panel of Arbitrators 1988-89, 1 Am. Stock Ex. Guide (CCH) 158-60 ..... 9

Annual Report of the Director of the Administrative Office of the United States Courts 1988 ..... 12n

Brief of the SEC as *amicus curiae* in *Shearson/American Express, Inc. v. McMahon*, No. 86-44..... 8

Brief of the SIA as *amicus curiae* in *Dain Bosworth Incorporated v. Johnson*, No. 88-284 ..... 3

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News, 5038, 5107..... 14

New York Stock Exchange Response to the SEC Request for Review of Predispute Arbitration Agreements, October 14, 1988, *reprinted in* P. Hoblin, Jr., *Securities Arbitration Procedures Strategies Cases* (2d Supp. 1989)..... 12n

SEC Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979)..... 8

Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989) ..... 11n

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-231**

---

SHEARSON LEHMAN/AMERICAN EXPRESS INC.
and RAYMOND R. CLEMENTS,

*Petitioners,*

—v.—

FRANK L. BIRD, Trustee of the FRANK L. BIRD
PROFIT SHARING TRUST, FRANK L. BIRD, Individually,
and JOAN SHEA,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

---

### PRELIMINARY STATEMENT

The Securities Industry Association ("SIA"), The Advest Group, Inc. ("Advest"), J.C. Bradford & Co. ("Bradford"), Dain Bosworth Incorporated ("Dain Bosworth"), D.A. Davidson & Co., Inc. ("Davidson"), Dean Witter Reynolds Inc. ("Dean Witter"), A.G. Edwards & Sons, Inc. ("A.G. Edwards"), Goldman, Sachs & Co. ("Goldman Sachs"), J.J.B. Hilliard, W.L. Lyons, Inc. ("Hilliard Lyons"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill

Lynch"), Piper, Jaffray & Hopwood Incorporated ("Piper Jaffray"), Prescott, Ball & Turben, Inc. ("Prescott"), Prudential-Bache Securities Inc. ("Prudential"), and Wheat, First Securities, Inc. ("Wheat First") submit this brief as *amici curiae* in support of the Petitioners, and urge this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit with respect to its decision and judgment below in *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989).

## INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as members more than six hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate claims between securities firms and their customers may be enforced. Because arbitration is an efficient, fair, and economical manner of resolving disputes, most of SIA's members have agreed with many of their customers to arbitrate any controversies arising between them. Among these members are *amici* Advest, Bradford, Dain Bosworth, Davidson, Dean Witter, A.G. Edwards, Goldman Sachs, Hilliard Lyons, Merrill Lynch, Piper Jaffray, Prescott, Prudential, and Wheat First.

*Amici curiae* therefore have a substantial interest in having this Court resolve whether agreements to arbitrate claims arising under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA") are enforceable as valid contracts under Section 2 of the United States Arbitration Act, 9 U.S.C. § 2, as this Court has found with respect to claims arising under the antitrust laws, the racketeering laws, and the securities laws. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express* v. *McMahon*, 482 U.S. 220 (1987); and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989). *Amici* seek to clarify and make uniform the law on this issue so that the enforceabil-

ity of arbitration provisions in agreements with their customers can be predicted and relied upon.

This concern is not abstract: a significant portion of *amici*'s accounts, such as Individual Retirement Accounts, are subject to ERISA. The decision below has the anomalous result of rendering the same agreement enforceable as to some accounts and unenforceable as to others. As a practical matter, it would carve a major exception to the rule this Court set down in *Rodriguez* and *McMahon*: that arbitration clauses in brokerage agreements are enforceable under the Arbitration Act.

SIA has also filed *amicus* briefs with this Court on the enforceability of agreements to arbitrate in *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), *Dain Bosworth Incorporated* v. *Johnson*, No. 88-284, and *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989).

## REASONS FOR GRANTING A WRIT OF *CERTIORARI*

At issue here is whether the lower courts have license to infer congressional intent to overrule the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "Arbitration Act"), without any direct evidence that Congress intended to do so. Although this Court has repeatedly held in no uncertain terms that predispute agreements to arbitrate claims arising under federal statutes are enforceable under the Arbitration Act absent a showing of specific congressional intent to repeal the effect of the Arbitration Act with respect to such claims, *see Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express* v. *McMahon*, 482 U.S. 220 (1987), *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989), the Court of Appeals below refused to enforce a predispute agreement to arbitrate claims arising under ERISA, without even purporting to find any direct expression of congressional intent to overrule the Arbitration Act.

## SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Second Circuit below, *Bird* v. *Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989), held that predispute agreements to arbitrate ERISA claims are unenforceable, in spite of the Arbitration Act's mandate that an agreement to arbitrate is as enforceable as any other valid contract. The decision below rested upon two erroneous premises: (1) a conclusion, indefensible in light of this Court's recent Arbitration Act decisions, that arbitration of ERISA claims is inconsistent with that statute's "remedial" purposes, and (2) a misapplication of the test for determining whether Congress repealed the Arbitration Act by implication with respect to ERISA claims. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983). As to the former premise, it assumes that the enforcement of agreements to arbitrate ERISA claims dilutes the substantive provisions of that Act, a view consistently rejected by this Court in analogous contexts. As to the latter premise, the Court of Appeals, being unable to find statutory language conflicting with the Arbitration Act or legislative history demonstrating congressional intent to repeal the Arbitration Act, in effect overruled the substantive, congressional policies embodied in the Arbitration Act solely on the basis of its own conception of public policy.

A writ of *certiorari* is also appropriate here because a split in the Circuits exists. In contrast to the result here, the Court of Appeals for the Eighth Circuit has analyzed the issue in the manner set forth by this Court in *Mitsubishi*, *McMahon*, and *Rodriguez* and has held that predispute agreements to arbitrate *are* enforceable with respect to ERISA claims. *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

Such results as the Court of Appeals for the Second Circuit reached below can only lead lower courts to stray from the rule laid down by this Court: that the Arbitration Act is valid except

where Congress has expressed its intention, either in statutory language or legislative history, to repeal it. *Amici* respectfully submit that the petition for *certiorari* should be granted in order to prevent inconsistent treatment among the lower courts that are trying to define the scope and validity of the Arbitration Act.

## POINT I

## THE UNITED STATES ARBITRATION ACT MANDATES THAT ARBITRATION BE RECOGNIZED AS AN EFFICIENT AND WIDELY ACCEPTED MEANS OF RESOLVING BROKER-CUSTOMER DISPUTES IN THE SECURITIES INDUSTRY

The United States Arbitration Act provides that an agreement to arbitrate in a contract involving interstate commerce is valid to the same extent as any other contract. When Congress passed the Arbitration Act in 1925, it established a clear federal policy favoring the use of arbitration to resolve disputes. That policy marked a decisive shift from the hostility to arbitration then prevalent in the courts.

In its recent decisions, this Court has found occasion to recognize the policy behind the Arbitration Act. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court observed:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

473 U.S. at 626-27. *Accord Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 109 S.Ct. at 1920 (" 'the old judicial hostility to arbitrations' . . . has been steadily eroded over the years") (quoting *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (Frank, J.)); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. at 24 (the Arbitration Act "is a congressional declaration of a lib-

eral federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *Southland Corp.* v. *Keating*, 465 U.S. at 10 (in enacting the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

The Court of Appeals' refusal to enforce predispute agreements to arbitrate ERISA claims rested in large part on its conception of ERISA as a remedial statute. In the words of the Court of Appeals:

> The federal courts have consistently interpreted ERISA as a remedial statute designed to "curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards."

871 F.2d at 296-97 (quoting *Taggert Corp.* v. *Efros*, 475 F. Supp. 124 (S.D. Tex. 1979). Yet ERISA's remedial purpose can have no bearing as to whether agreements to arbitrate ERISA claims are enforceable under the Arbitration Act, unless it is assumed that arbitration of ERISA claims somehow dilutes the substantive rights conferred by that statute.

This Court has rejected the predicate of the decision below, the notion that an agreement to arbitrate controversies under a federal statute affects the substantive provisions of that statute:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* 473 U.S. at 628; *accord*, *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. at 1920-21; *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. at 232. In these cases, the Court enforced agreements to arbitrate claims arising under three of the most fundamentally remedial

bodies of federal statutory law: the antitrust laws (*Mitsubishi*), the securities laws (*McMahon* and *Rodriguez*), and the Racketeering Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (*McMahon*). Indeed, the Court of Appeals' contention that the enforcement of agreements to arbitrate ERISA claims is inconsistent with ERISA's remedial purpose not only flies in the face of the decision of this Court, it echoes the Court of Appeals' since reversed conclusion in *McMahon* v. *Shearson/American Express*, 788 F.2d 94, 98 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987), as to "the inappropriateness of the United States Arbitration Act when strong public policy considerations are involved." [1]

The established structure of arbitration in the securities industry, which this Court has recognized in *McMahon* and *Rodriguez*, refutes the Court of Appeals' assumption that the enforcement of contracts to arbitrate ERISA disputes will dilute the protection of ERISA beneficiaries. Securities exchanges and the National Association of Securities Dealers, Inc. (the "N.A.S.D."), under the supervision of the Securities and Exchange Commission (the "Commission"), provide arbitration facilities for disputes between member firms and their public customers.[2] The current procedures have evolved since 1872, when the New York Stock Exchange, Inc., first adopted arbitration procedures for customer disputes. The N.A.S.D. has maintained arbitration facilities for more than forty years.

---

1 As Judge Cardamone stated in dissent below:

> Simply labeling ERISA as "remedial" is insufficient, it seems to me, to rebut the heavy presumption in favor of freedom of contract to arbitrate, particularly as the High Court has sustained the validity of compulsory arbitration agreements under other "remedial" statutes.

871 F.2d at 299-300.

2 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3701; N.Y.S.E. Rule 600 (a copy of the New York Stock Exchange, Inc. Arbitration Rules is contained in the Supplemental Lodging of Amici Curiae); Uniform Code of Arbitration § 1, *reprinted in* Sixth Report of the Securities Industry Conference on Arbitration (August 1989).

The exchanges and the N.A.S.D. also have permanent arbitration staffs. Their rules and constitutions contain detailed codes of arbitration procedures.[3]

Moreover, the Commission has approved the implementation and operation of this arbitral system, *see* Exchange Act Release No. 16390, (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979), and retains jurisdiction to monitor the fairness of arbitration proceedings. *See* Section 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78s. As the Commission itself argued to this Court in *McMahon*, in a brief signed by its General Counsel and Solicitor:

> [T]he Commission has had the power to ensure that arbitration procedures prescribed by the [Self-Regulatory Organizations] are adequate to enforce the rights of customers against brokerage firms that are members of SROs. In these circumstances, the suspicion of arbitration on which *Wilko* rested is inappropriate, and an agreement to arbitrate accordingly should not be deemed a waiver of rights under the Exchange Act.

*Shearson/American Express, Inc.* v. *McMahon*, No. 86-44, Brief of the Securities and Exchange Commission as *amicus curiae* at 13.

That the Securities Industry Conference on Arbitration ("SICA") and the Commission worked together to add further improvements to SRO arbitration codes in the year following the *McMahon* decision proves that the Commission can and will exercise its oversight authority and that SROs will respond in a constructive manner. During the Summer of 1988, the Commission invited SICA and the stock exchanges to review and possibly revise their arbitration rules in certain respects. SICA and the stock exchanges considered the matter and

---

3 *See, e.g.*, Constitution of the New York Stock Exchange, Inc., Art. XI, 2 N.Y.S.E. Guide (CCH) ¶¶ 1501-1503; Rules 600-638 of the New York Stock Exchange, Inc.; Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., N.A.S.D. Manual (CCH) ¶¶ 3701-3746; Arbitration Rules of the American Stock Exchange, Inc., 2 Am. Stock Ex. Guide (CCH) ¶¶ 9540-9551J.

drafted amendments to their arbitration rules, which were adopted on May 10, 1989.

As changed, the rules require that any arbitration clause in a broker-customer agreement be highlighted and in plain language. In addition, the arbitration clause must disclose to the customer that he is thereby foregoing a jury trial in any lawsuit against his broker and agreeing to limits on discovery and appellate review.[4] The contract must also disclose the presence of the arbitration clause immediately before the customer's signature line.[5] The amendments further require that discovery requests be responded to within 30 days and provide for a prehearing conference before an arbitration panel to resolve discovery disputes.[6] Retired securities industry personnel (as well as professionals who do substantial business with securities firms) cannot serve as public arbitrators, and all who serve as arbitrators must provide their employment history for the prior ten years to the parties.[7] A record, either stenographic or taped, must be kept of all arbitration proceedings, and, lastly, arbitration awards must be made public and state the issue involved, the amount claimed, and the amount actually awarded.[8]

The long established competence of securities industry arbitrators to adjudicate disputes should dispel any suspicion of the arbitral process in that industry. The stock exchanges and the N.A.S.D. keep permanent lists of arbitrators. These lists comprise senior securities industry personnel, as well as attorneys and other professionals from outside the industry, who are well versed in the field. *See, e.g.*, Panel of Arbitrators 1988-89, 1 Am. Stock Ex. Guide (CCH) 158-60; N.A.S.D. Manual (CCH) ¶ 3702. Most have previously served as arbitrators and are therefore well acquainted with arbitration procedures and customs. Thus, this Court's observation in *Mitsubishi* that "adapt-

---

4 *See* N.Y.S.E. Rule 637(1).

5 *See* N.Y.S.E. Rule 637(2).

6 *See* N.Y.S.E. Rule 619(a)(2), (d).

7 *See* N.Y.S.E. Rules 608 and 610.

8 *See* N.Y.S.E. Rules 623 and 627.

ability and access to expertise are hallmarks of arbitration," 473 U.S. at 633, hits the mark with respect to the securities industry.

The arbitration rules of the N.A.S.D. and the various stock exchanges further ensure that arbitration practice in the securities industry will be efficient and impartial. For example, these rules require a majority of "public" arbitrators (*i.e.*, unaffiliated with member firms) in disputes between public customers and member firms unless the customer requests otherwise.[9] Arbitrators are required to disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest.[10] Each party in an arbitration has at least one peremptory challenge, as well as unlimited challenges for cause.[11]

The arbitration itself provides for a full and fair hearing. The parties have the right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to have a transcript of the hearing taken. They may subpoena witnesses and documents just as in a court proceeding, and may also compel the presence of any employee of a member of the sponsoring institution at a hearing, regardless of whether that employee would be within the subpoena power of the courts for the state where the hearing is held.[12] Moreover, arbitrators serve, and witnesses testify, under oath.[13] The fairness of these rules and

---

9 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542 (Rule 602); N.A.S.D. Manual (CCH) ¶ 3719; N.Y.S.E. Rule 607; Uniform Code of Arbitration § 8.

10 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f)-9542A (Rules 602(f) and 603); N.A.S.D. Manual (CCH) ¶ 3723; N.Y.S.E. Rule 610; Uniform Code of Arbitration § 11.

11 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9542(f) (Rule 602(f)); N.A.S.D. Manual (CCH) ¶ 3722; N.Y.S.E. Rule 609; Uniform Code of Arbitration § 10.

12 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9545A, 9548-49, 9551A (Rules 607, 610-11, 614); N.Y.S.E. Rules 614-15, 619, 623; Uniform Code of Arbitration ¶¶ 15-16, 20.

13 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551B (Rule 615); N.Y.S.E. Rule 624; Uniform Code of Arbitration § 25.

procedures is borne out by the results of arbitrations conducted under them. For the years 1980-1988, 51% of public customer cases that went to arbitration before one of the stock exchanges or the N.A.S.D. and were decided—rather than being settled—awarded damages to the customer.[14]

Moreover, the arbitration process significantly reduces discovery expenses and minimizes delay in reaching a hearing. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628; C. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 Fordham L. Rev. 279, 286-87 (1984). For example, state laws generally provide subpoena power to arbitrators and counsel, and parties are encouraged to produce documents "to the fullest extent possible without resort to the issuance of the subpoena process."[15] Arbitrators may also direct the appearance of persons associated with member organizations or the production of records of these organizations without using the subpoena process.[16] That most stock exchanges and the N.A.S.D. offer a streamlined arbitration procedure for smaller claims also enables customers to resolve small disputes without incurring great expense.[17] Arbitration also offers an expeditious result. According to a survey conducted by the accounting firm of Deloitte Haskins & Sells ("DH&S") at the request of the New York Stock Exchange, Inc., the average arbitration proceeding took almost six months less, from filing of the com-

---

14 *See* Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989) excerpts of which are reproduced in the Appendix to this Brief.

15 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9548 (Rule 610); N.A.S.D. Manual (CCH) ¶ 3732; N.Y.S.E. Rule 619(f); Uniform Code of Arbitration § 20; C. Katsoris, *supra*, at 286.

16 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9549 (Rule 611); N.A.S.D. Manual (CCH) ¶ 3733; N.Y.S.E. Rule 619(g); Uniform Code of Arbitration § 20.

17 *See, e.g.*, 2 Am. Stock Ex. Guide (CCH) ¶ 9551H (Rule 621); N.A.S.D. Manual (CCH) ¶ 3710; N.Y.S.E. Rule 601; Uniform Code of Arbitration § 2.

plaint to the ultimate judgment, than the average litigation.[18] In addition, according to statistics complied by the Securities Industry Conference on Arbitration, nearly 6,101 securities industry arbitrations were filed with stock exchanges and the N.A.S.D. in 1988, and 3,740 arbitrations in the securities industry were resolved during that year.[19] The 1988 figures represent more than four times the number of arbitrations filed in 1982.[20]

Finally, the excessive caseload in the federal district courts makes it all the more important that arbitrable claims between securities firms and their customers proceed to arbitration. Filings of ERISA claims increased by 625 to 6,704 filings in 1988.[21] Since the average caseload per United States District Judge in 1988 was 493 cases,[22] permitting agreements to arbitrate all ERISA claims would effectively create up to 13 new federal district judgeships, which could help to relieve the federal courts of their overloaded dockets.

## POINT II

## THE COURT BELOW MISAPPLIED THE STANDARD FOR FINDING AN IMPLIED REPEAL OF THE UNITED STATES ARBITRATION ACT

In reaching its decision below, the Court of Appeals concluded that Congress intended to repeal the Arbitration Act with respect to ERISA claims. Yet because it divined congres-

---

18 New York Stock Exchange Response to the Securities and Exchange Commission Request for Review of Predispute Arbitration Agreements, October 14, 1988, *reprinted in* P. Hoblin, Jr., *Securities Arbitration Procedures Strategies Cases* (2d Supp. 1989). DH&S used a sample of 243 cases (66 litigations, 142 arbitrations, and 35 litigations transferred to arbitration) over a three month time frame.

19 *See* Appendix.

20 The number of filings rose from 1,340 in 1982 to 6,101 in 1987. *See* Appendix.

21 Annual Report of the Director of the Administrative Office of the United States Courts 1988 at 10 (1988).

22 Annual Report of the Director of the Administrative Office of the United States Courts at 7, 14 (1988).

sional intent without adequate legislative evidence, the court below reached an incorrect result by misapplication of the standard set by this Court.

*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* requires that any finding of an implied repeal of the Arbitration Act be supported by "congressional intention expressed in some other statute. . . ." 473 U.S. at 627. This is simply a reiteration of the traditional standard for finding that a federal statute has been repealed by implication by a subsequently enacted federal statute. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 88 (1982) (" 'repeals by implication [of a prior statute by a subsequently enacted one] are disfavored' ") (quoting *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention [by Congress] to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable").

In *Mitsubishi*, this Court stated:

> We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

473 U.S. at 628.

Under this test, there can be no question that predispute agreements to arbitrate ERISA claims are enforceable under the Arbitration Act. ERISA contains no statutory language that restricts a party's ability to choose an arbitral forum with respect to claims brought thereunder.[23] Nor is there any evidence in the legislative history of ERISA that Congress intended to repeal the Arbitration Act with respect to ERISA

---

23 Quite to the contrary, Section 1144(d) of the ERISA provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in Sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d). Sections 1031 and 1137(b) do not refer to the Arbitration Act in any way.

claims. In the words of the Court of Appeals for the Eighth Circuit in *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988), "our examination reveals no congressional intent to single out ERISA claims for exemption from the general federal policy favoring rigorous enforcement of agreements to arbitrate . . . ."

None of the legislative matter cited by the court below can qualify as evidence of a congressional intent to repeal the Arbitration Act. That Congress bestowed exclusive jurisdiction on the federal courts to hear ERISA claims does not demonstrate an intent to repeal the Arbitration Act. To the contrary, this Court in *McMahon* held that agreements to arbitrate claims arising under the Securities Exchange Act of 1934, 15 U.S.C. § 78 *et seq.* (the "Exchange Act"), to be enforceable under the Arbitration Act even though Section 27 of the Exchange Act, 15 U.S.C. § 78aa, provides for exclusive federal jurisdiction over Exchange Act claims. If an exclusive federal jurisdiction provision does not show congressional intent to repeal the Arbitration Act with respect to Exchange Act claims, it cannot do so with respect to ERISA claims.

As to the reference in the ERISA conference report to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, that reference applies only to "actions to enforce or clarify benefit rights provided under title I [of ERISA]," H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5034, 5107, and not to actions for breach of fiduciary duty, like the case at bar.[24]

Last, the three cases decided by this Court that the Court of Appeals cited in support of its opinion, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984), have no bearing on this case. All those cases concerned the enforceability and binding effect

---

24 The Court of Appeals acknowledged that Section 301 deals with "the applicable law for the breach of a collective bargaining agreement." 871 F.2d at 298.

of agreements to arbitrate contained in collective bargaining agreements purporting to bind individuals subject to those agreements, as opposed to a direct agreement among individual parties to arbitrate controversies. Their holdings depended upon factors unique to the context of arbitration clauses in collective bargaining agreements. In each case, the litigation of the employee's claim was controlled by the union involved, with the result that the employee lacked control over the proceeding, unlike the plaintiff here. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 58 n.19. Indeed, in each case, the Court specifically noted that the union prosecuting the claim might have a different interest than the employee whose claim it was. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 58 n.19; *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 742; *McDonald* v. *City of West Branch*, 466 U.S. at 291. Here, by contrast, where the plaintiff has full control over the prosecution of his claim, there is no possibility of such a conflict of interest. Likewise, the fact that arbitrators under collective bargaining agreements often have limited jurisdiction to enforce the terms of the collective bargaining agreement, and their expertise tends towards "the law of the shop, not the law of the land," *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 57; *McDonald* v. *City of West Branch*, 466 U.S. at 290-91, distinguishes them from the situation at bar. Here the arbitrators of the various stock exchanges have plenary power to resolve any claims brought before them. In short, there can be no application of the rules of *Alexander*, *Barrentine*, and *McDonald* beyond the issue of the effect of arbitration agreements in collective bargaining cases, and those cases in no way impair the governance of *Rodriguez*, *McMahon*, and *Mitsubishi* to this case.

## POINT III

## THE CIRCUITS STAND IN CONFLICT AS TO THE ARBITRABILITY OF ERISA CLAIMS

A direct conflict now exists among the Courts of Appeal with respect to whether a predispute agreement to arbitrate claims

arising under the Securities Act is enforceable. The decision below directly conflicts with the decision of the Court of Appeals for the Eighth Circuit in *Arnulfo P. Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (1988). There, the Court of Appeals followed the analysis employed by this Court in *Mitsubishi*, *McMahon*, and *Rodriguez* and held that agreements to arbitrate ERISA claims are enforceable under the Arbitration Act.

## CONCLUSION

For the reasons set forth above, *amici curiae* the Securities Industry Association, The Advest Group, Inc., J.C. Bradford & Co., Dain Bosworth Incorporated, D.A. Davidson & Co., Inc., Dean Witter Reynolds Inc., A.G. Edwards & Sons, Inc., Goldman, Sachs & Co., J.J.B. Hilliard, W.L. Lyons, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper, Jaffray & Hopwood Incorporated, Prescott, Ball & Turben, Inc., Prudential-Bache Securities Inc., and Wheat, First Securities, Inc., respectfully request that the petition for a writ of *certiorari* be granted.

Dated: September 6, 1989

Respectfully submitted,

JAMES K. MANNING
Counsel of record; and
PAUL WINDELS III
ELIZABETH STORCH
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for *Amici Curiae*

*Of Counsel*:

| | |
|---|---|
| William J. Fitzpatrick, Esq.<br>Gerard J. Quinn, Esq. | SECURITIES INDUSTRY ASSOCIATION |
| Lee E. Kuckro, Esq. | THE ADVEST GROUP, INC. |
| R. Patrick Shepherd, Esq. | J.C. BRADFORD & CO. |
| Louis L. Bulba, Esq. | DAIN BOSWORTH INCORPORATED |
| Bruce A. MacKenzie, Esq. | D.A. DAVIDSON & CO., INC. |
| Paul J. Dubow, Esq. | DEAN WITTER REYNOLDS INC. |
| Brian C. Underwood, Esq. | A.G. EDWARDS & SONS, INC. |
| Robert J. Katz | GOLDMAN, SACHS & CO. |
| James C. Stone III, Esq. | J.J.B. HILLIARD, W.L. LYONS, INC. |
| Philip M. Mandel, Esq. | MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED |
| David E. Rosedahl, Esq. | PIPER, JAFFRAY & HOPWOOD INCORPORATED |
| Robert Shiffra, Esq. | PRESCOTT, BALL & TURBEN, INC. |
| Loren Schechter, Esq. | PRUDENTIAL-BACHE SECURITIES INC. |
| John Harris, Esq. | WHEAT, FIRST SECURITIES, INC. |

# APPENDIX

# Sixth Report of the Securities Industry Conference on Arbitration Statistical Report (August 1989)

## COMPOSITE ARBITRATION FIGURES

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 830 | 686 | 332 | 269 | 410 | 205 |
| 1981 | 1,042 | 980 | 306 | 357 | 532 | 264 |
| 1982 | 1,340 | 1,044 | 322 | 292 | 558 | 293 |
| 1983 | 1,731 | 1,259 | 416 | 320 | 622 | 331 |
| 1984 | 2,449 | 1,762 | 561 | 489 | 736 | 366 |
| 1985 | 2,796 | 2,190 | 664 | 520 | 961 | 530 |
| 1986 | 2,838 | 2,460 | 657 | 610 | 1,017 | 506 |
| 1987 | 4,358 | 2,958 | 827 | 641 | 1,153 | 636 |
| 1988 | 6,101 | 3,740 | 1,473 | 930 | 1,561 | 743 |

## AMERICAN STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 45 | 41 | 18 | 11 | 35 | 16 |
| 1981 | 39 | 40 | 7 | 11 | 42 | 22 |
| 1982 | 37 | 31 | 9 | 4 | 16 | 10 |
| 1983 | 41 | 42 | 14 | 8 | 10 | 6 |
| 1984 | 69 | 53 | 16 | 14 | 45 | 26 |
| 1985 | 64 | 58 | 21 | 14 | 41 | 24 |
| 1986 | 63 | 60 | 20 | 28 | 31 | 14 |
| 1987 | 92 | 74 | 34 | 24 | 41 | 24 |
| 1988 | 100 | 63 | 21 | 29 | 27 | 12 |

Cases carried over into 1989: 87

# BOSTON STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 2 | 2 | 2 | 2 | 2 | 0 |
| 1981 | 2 | 2 | 2 | 2 | 0 | 0 |
| 1982 | 1 | 1 | 1 | 1 | 1 | 1 |
| 1983 | 2 | 2 | 2 | 2 | 2 | 1 |
| 1984 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1985 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1986 | 2 | 2 | 2 | 2 | 2 | 0 |
| 1987 | 0 | 0 | 0 | 0 | 0 | 0 |
| 1988 | 0 | 0 | 0 | 0 | 0 | 0 |

Cases carried over into 1989: 0

## CHICAGO BOARD OPTIONS EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 44 | 31 | 11 | 11 | 18 | 6 |
| 1981 | 41 | 32 | 10 | 8 | 12 | 3 |
| 1982 | 50 | 38 | 6 | 6 | 14 | 3 |
| 1983 | 75 | 45 | 5 | 4 | 13 | 6 |
| 1984 | 91 | 56 | 24 | 16 | 4 | 3 |
| 1985 | 64 | 38 | 10 | 5 | 0 | 0 |
| 1986 | 72 | 44 | 16 | 9 | 12 | 9 |
| 1987 | 130 | 93 | 29 | 33 | 22 | 9 |
| 1988 | 149 | 89 | 22 | 27 | 48 | 12 |

Cases carried over into 1989: 151

## MIDWEST STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 2 | 2 | 1 | 0 | 1 | 1 |
| 1981 | 2 | 2 | 0 | 0 | 0 | 0 |
| 1982 | 1 | 0 | 0 | 0 | 0 | 0 |
| 1983 | 2 | 2 | 0 | 0 | 0 | 0 |
| 1984 | 1 | 0 | 0 | 0 | 0 | 0 |
| 1985 | 1 | 0 | 0 | 0 | 0 | 0 |
| 1986 | 4 | 0 | 1 | 0 | 0 | 0 |
| 1987 | 5 | 3 | 1 | 1 | 1 | 1 |
| 1988 | 1 | 7 | 0 | 0 | 0 | 0 |

Cases carried over into 1989: 2

# MUNICIPAL SECURITIES RULEMAKING BOARD

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 21 | 21 | 7 | 7 | 3 | 2 |
| 1981 | 25 | 25 | 5 | 5 | 7 | 4 |
| 1982 | 33 | 16 | 7 | 7 | 13 | 6 |
| 1983 | 78 | 40 | 17 | 9 | 14 | 5 |
| 1984 | 113 | 80 | 20 | 17 | 34 | 21 |
| 1985 | 91 | 118 | 31 | 35 | 54 | 31 |
| 1986 | 82 | 89 | 30 | 21 | 30 | 15 |
| 1987 | 106 | 90 | 38 | 34 | 42 | 24 |
| 1988 | 115 | 126 | 49 | 52 | 63 | 37 |

Cases carried over into 1989: 59

# NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 318 | 234 | 134 | 113 | 122 | 56 |
| 1981 | 422 | 422 | 142 | 177 | 242 | 118 |
| 1982 | 606 | 435 | 157 | 139 | 276 | 140 |
| 1983 | 768 | 549 | 216 | 147 | 272 | 161 |
| 1984 | 1,108 | 747 | 298 | 244 | 381 | 196 |
| 1985 | 1,400 | 962 | 377 | 250 | 434 | 232 |
| 1986 | 1,587 | 1,199 | 390 | 327 | 476 | 248 |
| 1987 | 2,866 | 1,625 | 458 | 325 | 642 | 364 |
| 1988 | 3,990 | 2,169 | 1,084 | 539 | 934 | 432 |

Cases carried over into 1989: 4,005

## NEW YORK STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 367 | 327 | 131 | 110 | 221 | 119 |
| 1981 | 477 | 433 | 117 | 134 | 214 | 111 |
| 1982 | 558 | 473 | 109 | 113 | 214 | 118 |
| 1983 | 713 | 532 | 136 | 122 | 276 | 137 |
| 1984 | 1,008 | 796 | 176 | 183 | 259 | 113 |
| 1985 | 1,095 | 962 | 198 | 190 | 424 | 221 |
| 1986 | 965 | 1,004 | 181 | 205 | 432 | 210 |
| 1987 | 1,050 | 1,000 | 225 | 204 | 378 | 200 |
| 1988 | 1,623 | 1,196 | 263 | 235 | 440 | 228 |

Cases carried over into 1989: 1,269

## PACIFIC STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 24 | 28 | 12 | 11 | 4 | 3 |
| 1981 | 24 | 20 | 17 | 17 | 9 | 5 |
| 1982 | 31 | 21 | 15 | 11 | 10 | 7 |
| 1983 | 35 | 29 | 17 | 17 | 23 | 10 |
| 1984 | 45 | 26 | 21 | 11 | 10 | 7 |
| 1985 | 50 | 40 | 12 | 18 | 20 | 12 |
| 1986 | 41 | 37 | 9 | 13 | 18 | 8 |
| 1987 | 64 | 58 | 27 | 11 | 23 | 13 |
| 1988 | 99 | 77 | 30 | 40 | 45 | 20 |

Cases carried over into 1989: 86

## PHILADELPHIA STOCK EXCHANGE, INC.

| | Total Cases Received | Total Cases Concluded Including Settlement | Small Claims Received | Small Claims Concluded | Public Customer Cases Decided | Awards in Favor of Public |
|---|---|---|---|---|---|---|
| 1980 | 7 | 0 | 16 | 4 | 4 | 2 |
| 1981 | 10 | 6 | 6 | 3 | 6 | 1 |
| 1982 | 23 | 15 | 18 | 11 | 14 | 8 |
| 1983 | 17 | 19 | 9 | 11 | 12 | 5 |
| 1984 | 14 | 7 | 6 | 4 | 3 | 0 |
| 1985 | 31 | 18 | 15 | 8 | 8 | 2 |
| 1986 | 22 | 15 | 10 | 6 | 7 | 2 |
| 1987 | 25 | 15 | 15 | 9 | 4 | 1 |
| 1988 | 24 | 13 | 4 | 8 | 4 | 2 |

Cases carried over into 1986: 42